No. 87-351

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE STEARNS COMPANY - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, FOR REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR RECONSIDERATION IN LIGHT OF CONTROLLING DECISION RENDERED BY THE KENTUCKY SUPREME COURT

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QUESTIONS PRESENTED

1. Whether this Court should remand to the circuit court of appeals for further consideration a case involving mineral rights under Kentucky law when, on July 2, 1987, one month after the federal court's opinion on rehearing, the Kentucky Supreme Court restated and clarified state law in an opinion which rejected the reasoning and the case law previously relied upon by the federal appellate court.

2. Whether this Court should review a federal appellate court's ruling which held that, under Kentucky law, a mineral deed did not reserve in the mineral owner any right to surface mine when the deed between the parties expressly granted the mineral owner the right to use or disturb the surface when "reasonable and, according to recognized good practice, necessary for the purpose."

3. Whether this Court should review a federal appellate court's ruling which held that, under Kentucky law, a mineral deed did not reserve in the mineral owner the right to surface mine when, after the appellate court's ruling, the Kentucky Supreme Court issued an opinion restating and clarifying the law on mineral rights to declare that under deeds similar to the one at bar the mineral estate is "dominant" over the surface estate permitting the mineral owner to surface mine — particularly when such mining method is the only type available to remove the coal.

STATEMENT REQUIRED BY RULE 28.1

The Stearns Company has no parent corporations or affiliates, and all its subsidiaries are wholly-owned.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

STATEMENT REQUIRED BY RULE 28.1 ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1– 2

I. STATEMENT OF THE CASE 2

A. General Overview 2– 6

B. Specific Factual Background 7–14

1. Facts 7– 9

2. Decisions of the Lower Courts 9–14

(a) *District Court* 9–13

(b) *Sixth Circuit* 13–14

3. Opinion of the Kentucky Supreme Court.14–18

II. REASONS WHY PETITIONER'S REQUEST SHOULD BE GRANTED 19–23

III. CONCLUSION 24

APPENDIX 1a–80a

Opinion of Court of Appeals 1a

Order of Court of Appeals Denying Rehearing .. 2a–11a

Opinion of District Court 12a–24a

Opinion of Kentucky Supreme Court 25a–80a

TABLE OF AUTHORITIES

Cases:

PAGE

Akers v. *Baldwin*, No. 85-SC-392-CL, and *Baker* v. *Wooten*, No. 85-SC-422-TG (consolidated on appeal) slip op. (Ky. July 2, 1987) 3, 5, 15, 16
Blue Diamond Coal Co. v. *Neace*, 337 S.W. 2d 725, 727 (Ky. 1960) 15
Buchanan v. *Watson*, 290 S.W. 2d 40 (Ky. 1956)... 11
Commerce Union Bank v. *Kinkade*, 540 S.W. 2d 861 (Ky. 1976) 17
Croley v. *Round Mountain Coal Co.*, 374 S.W. 2d 852 (Ky. 1964) 12
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64 (1938) .19, 21
Henry v. *City of Rock Hill*, 376 U. S. 776 (1964) .. 23
Martin v. *Kentucky Oak Mining Co.*, 429 S.W. 2d 395 (Ky. 1968) 11, 13, 17
Maryland Casualty Co. v. *Hallatt*, 326 F. 2d 275, 277 (5th Cir. 1964) 19
Peabody Coal Co. v. *Erwin*, 453 F. 2d (6th Cir. 1971) 17
Peabody Coal Co. v. *Pasco*, 452 F. 2d 1126 (6th Cir. 1971) 13
Rudd v. *Hayden*, 265 Ky. 495, 97 S.W. 2d 35, 37 (1936) 20

Statutes:

Clarke-McNary Act of 1924, 43 Stat. 653, Ch. 348.. 7
Weeks Act of 1911, 36 Stat. 961, ch. 186 7
KRS §§ 381.930-381.945 10
Wright & Miller, *Federal Practice and Procedure: Jurisdiction* § 4507 (1982) 19

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PETITION FOR WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, FOR REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR RECONSIDERATION IN LIGHT OF CONTROLLING DECISION RENDERED BY THE KENTUCKY SUPREME COURT

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ["App."] 2a-11a) is published at 816 F. 2d 279 (6th Cir. 1987). The opinion of the District Court (App. 12a-24a) is published at 595 F. Supp. 808 (E.D. Ky. 1984).

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on April 21, 1987. A timely petition for rehearing was denied on June 2, 1987. App. 1a. This

Court's jurisdiction is invoked under 28 U.S.C. § 1254 and 28 U.S.C. § 1391.

I. STATEMENT OF THE CASE

A. General Overview

This case involves a dispute between the Respondent, the United States of America ("United States"), acting in its proprietary capacity as surface owner of land, and the Petitioner, The Stearns Company ("Stearns"), the fee-simple owner of the mineral rights associated with that land. In particular, the issue is whether Stearns has the legal right, under Kentucky law, to engage in surface mining under its reservation of mineral rights in a 1937 deed conveying the surface estate to the United States. The United States Court of Appeals for the Sixth Circuit held on April 21, 1987 that, under Kentucky law, Stearns did not have the right to surface mine under its deed. Since that opinion, though, on July 2, 1987 the Kentucky Supreme Court thoroughly clarified and restated Kentucky law, and in its opinion the Kentucky Court knocked the pins out from under every basis for the Sixth Circuit's opinion. Accordingly, Stearns comes to this Court seeking review of the Circuit Court opinion or, alternatively, a remand of this case to the Sixth Circuit for reconsideration of its opinion in light of the recent Kentucky authority.

This case originated on May 1, 1978 by the filing of the plaintiff's complaint in the United States District Court for the Eastern District of Kentucky (Lon-

don Division) seeking to enjoin officials of the United States from interfering with the exercise of Stearns' lawful mineral rights, including the right to surface mine. This case required the district court to interpret provisions of the 1937 deed between Stearns and the United States in accord with Kentucky common law, and also to determine the effect of a newly-enacted statute, KRS 381.930-.945, which purported to govern the construction of mineral deeds. The district court entered an opinion in favor of the United States on October 9, 1984, but did not make it final and appealable until March 14, 1986. In the interim, the opinion was stayed because the Kentucky courts were contemporaneously considering several cases construing mineral deeds under common law. Additionally, the United States District Court for the Eastern District of Kentucky (Frankfort division) had before it the question of the constitutionality of the newly-enacted statute governing construction of mineral deeds. Eventually the question of the constitutionality of that statute was certified to the Kentucky Supreme Court, which then consolidated that question with an appeal involving the construction of a mineral deed under common law.[1] Thus, in mid-1985 the Kentucky Supreme Court had before it issues involving the con-

[1] *Akers* v. *Baldwin*, Civ. Action No. #84-88 (E.D. Ky.), involving the constitutionality of the statute, was certified to the Kentucky Supreme Court on April 29, 1985. *See Akers* v. *Baldwin*, No. 85-SC-392-CL. *Baker* v. *Wooten*, No. 83-CI-4291 (Perry Cir. Ct.) was transferred from the Court of Appeals to the Supreme Court for immediate consideration on April 3, 1985. *See* No. 85-SC-422-TG.

struction of mineral deeds under Kentucky common law and under the newly-enacted statute. This circumstance provided the Kentucky Supreme Court with a unique opportunity to clarify and stabilize one of the most important areas of state law.

Apparently because of the extended time period being taken by the Kentucky Supreme Court to decide the cases before it,[2] on March 14, 1986 the district court removed the stay and finalized its October 19, 1984 opinion. The district court principally based its decision upon an interpretation of Kentucky common law governing deed construction. Specifically, the lower court found "from all the language in the deed that the parties did not intend that Stearns would have the superior rights to extract the minerals over the surface rights of the government." 595 F. Supp. at 813; App. 23a-24a. Accordingly, the court declared "the surface rights of the United States in the deed involved are superior to the mineral rights of Stearns, so Stearns cannot engage in surface mining on the property listed in the deed involved without approval of the United States." *Id.;* App. at 24a. The court supported its conclusion with KRS 381.930, *et seq.,* although the court recognized that the statute's constitutionality was being challenged in state court. *Id.* at 812; App. 20a.

An appeal was taken by The Stearns Company to the United States Court of Appeals for the Sixth Cir-

[2]The Kentucky Supreme Court entered its decision in the consolidated cases on July 2, 1987. The opinion is not yet final because of pending motions for rehearing.

cuit, which affirmed the district court decision on April 21, 1987. The Sixth Circuit held that strip mining was not permitted under the Stearns deed because "the parties did not contemplate that Stearns could totally destroy the surface," and thus "Stearns may not, as owner of the subservient estate, commence strip mining operations without the permission of the owner of the dominant estate, the United States." 816 F. 2d at 283; App. at 9a. The court also held that in the event the statute were constitutional, it would affirm on the "alternative statutory ground that strip mining was not known to be commonly in use in this area of Kentucky when the deed was executed." *Id.* at 284; App. at 11a. In so ruling, the Court of Appeals stated that it felt there were inconsistencies in Kentucky cases, and the court chose to follow cases which ruled favorably to the surface owner rather than the rule of numerous other cases favoring the mineral owner. *Id.* at 282-83; App. at 8a.

Subsequent to the Sixth Circuit's decision, the Kentucky Supreme Court entered a landmark decision in the case of *Akers* v. *Baldwin,* No. 85-SC-392-CL, and *Baker* v. *Wooten,* No. 85-SC-422-TG, *Consolidated on appeal,* slip op. (Ky. July 2, 1987), on LEXIS, KY library, CASES file (hereinafter *Akers* and *Wooten*) (App. 25a-80a). The state court (1) held that the statute, KRS 381.930 *et seq.,* was unconstitutional; and (2) recognized that when a deed severs the mineral estate from the surface estate the mineral estate is necessarily the dominant estate and thus, unless expressly pro-

hibited, strip mining is allowed.[3] Significantly, in so holding, the Kentucky court specifically followed the reasoning of the cases rejected by the Sixth Circuit in this case, and the Kentucky court specifically disavowed the reasoning of the cases relied upon by the federal appellate court.

This new Kentucky case demonstrates clearly that the ruling of the Sixth Circuit erroneously deprives Stearns of its legitimate and lawful right under Kentucky law to surface mine.[4] However, the timing quirks of the various opinions kept the new and controlling state opinion from being considered by the federal appellate court. It is this patently unfair result that petitioner now asks this Court to remedy by accepting its petition for a writ of *certiorari* or, in the alternative, by remanding the case to the Sixth Circuit for reconsideration of its opinion in light of the decision of the Kentucky Supreme Court in the consolidated cases *Akers* and *Wooten, supra.*

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[3]The Court overruled prior case law, however, which had held that the mineral owner was not liable to the surface owner in damages if the deed contained a waiver of damages clause. Henceforth, Kentucky law requires the mineral owner to pay damages to the surface owner for *all* injury to the surface estate caused by the mining. *Id.* at 24, 28; App. at 51a.

[4]Indeed, the Sixth Circuit expressly stated in April that if the law were as the Kentucky Supreme Court later explained it to be in July, Stearns would win. 816 F. 2d at 282; App. at 7a.

B. Specific Factual Background

1. FACTS

In 1937, The Stearns Company (then the Stearns Coal and Lumber Co.) ("Stearns") conveyed to the United States by deed the surface rights to 46,842.4 acres of timberland in McCreary and Wayne Counties in Kentucky. The mineral rights were specifically reserved by Stearns:

> There is, also, RESERVED, all metaliferous minerals, coal, oil, gas and limestone in, upon and under the described tracts of land; PROVIDED, however, that all operations from mining and removing same same (sic) shall be done and carried on in accordance with the following rules and regulations prescribed by the Secretary of Agriculture, viz:

816 F. 2d at 281; App. at 5a.

The United States purchased the property pursuant to the Weeks Act of 1911, 36 Stat. 961, ch. 186 as amended by the Clarke-McNary Act of 1924, 43 Stat. 653, ch. 348 for inclusion in the Daniel Boone National Forest. The pertinent Agriculture Department regulation, which was included in the deed, provided as follows:

> (2) In prospecting for, and in mining and removing minerals, oil, or gas, and in manufacturing the products, thereof, only so much of the surface shall be occupied, used or disturbed as in (sic) reasonable and, according to recognized good practice, necessary for the purpose.

Id. The regulations placed in the deed also expressly prohibited "hydraulic" mining and required Stearns to pay for timber destroyed or damaged in mining. *Id.* The deed did not expressly permit or prohibit the right to surface mine by mechanical means; rather, this type of mining simply was not mentioned.

Since 1937, Stearns regularly conducted deep mining operations on its property, but much of the coal retained by Stearns can be removed *only* by surface mining methods. In the mid-1970's, Stearns sought to surface mine a 19-acre tract (that lay partly within the boundaries of the national forest) on which the United States owns the surface estate. The United States objected to such mining on the ground, *inter alia,* that Stearns' mineral reservation did not give Stearns the legal right to strip mine. The effect of the United States' position was that, for coal removable only by surface mining, no one actually owned it. That is to say, while Stearns held legal title to such coal, it could not recover the coal without first seeking permission to surface mine from the United States. The United States' position thus rendered the mineral estate "subservient" to the surface estate. Stearns, of course, disagreed with this position. Consequently, in 1978, Stearns brought suit in federal court seeking a writ of mandamus and injunction requiring the appropriate governmental officials to perform their legal obligations under the 1937 deed. The United States, acting in its proprietary capacity, then brought suit against The Stearns Company seeking a declaration

that Stearns' mineral reservation did not retain in Stearns the right to remove its coal by the strip mining method. The two suits were consolidated, and the issue of the rights of the parties under the 1937 deed was litigated. The parties agreed, and the lower courts so recognized, that these rights were to be determined by Kentucky property law principles.

2. DECISIONS OF THE LOWER COURTS

(a) *District Court:*

After a bench trial, by memorandum opinion filed October 9, 1984 (entered on March 14, 1986), the district court found that the deed, which was silent as to strip mining, was unambiguous. Despite this finding (which should have limited the court's analysis to the four-corners of the deed), the court then examined the circumstances surrounding the sale. The court basically concluded that since little or no strip mining had occurred in the surrounding area at the time of the deed, the parties did not contemplate strip mining of the property in question.[5] 595 F. Supp. at 812; App.

[5]The evidence, particularly the contemporaneous minutes and documents of the National Forest Reservation Commission, supports the position that the United States did not contemplate that Stearns would strip mine the property. But the court drew the wrong legal conclusion from this fact. The documents establish that in 1937 the avowed policy of the United States was to leave the right to strip mine with the mineral owner if the government believed that the likelihood of such mining was small. The policy envisioned that the cost savings to the United States from buying fewer rights would more than offset the occasional damages sustained when the United States guessed wrong. (This point was

(Footnote Continued on Next Page)

19a. From this fact, the court concluded that Stearns did not have the right to surface mine under its deed with the United States.

The district court further noted that between the time of trial and entry of its opinion, the Kentucky General Assembly had enacted, effective July 13, 1984, KRS §§ 381.930—381.945 providing the following rules of construction for mineral deeds relating to coal extraction:

> In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate only for the purposes of coal extraction by the method or methods of commercial coal extraction commonly

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(Footnote Continued From Preceding Page)

the focus of the oral argument before the Sixth Circuit, but in its opinion the appellate court failed to consider this evidence because of its strict (and erroneous) construction of the language of the deed.)

> known to be in use in Kentucky in the area affected at the time the instrument was executed.

KRS § 381.940 (quoted in 595 F. Supp. at 811; App. 19a).

The court stated that it believed this statute to be dispositive of the Stearns case, but because the statute's constitutionality was being challenged, the court proceeded to analyze the case under the common law of Kentucky. The court cited as the controlling Kentucky cases, *Buchanan* v. *Watson,* 290 S.W. 2d 40 (Ky. 1956), and *Martin* v. *Kentucky Oak Mining Co.,* 429 S.W. 2d 395 (Ky. 1968). In *Buchanan, supra,* 290 S.W. 2d at 43, the Kentucky court had held that under a "broad-form"[6] deed the mineral owner

> has the paramount right to the use of the surface in the prosecution of its business for any purpose

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[6]"Broad form" is the term commonly used to describe the deeds used by Jonh C. C. Mayo and others in the early years of this century when they acquired the mineral rights from landowners in Kentucky leaving the landowner with the surface rights. These deeds granted the mineral owner extensive rights to the use of the surface. For example, the mineral owner was given the right to "use and operate" the surface "in any and every manner that may be deemed necessary or convenient for mining, and therefrom removing." *Buchanan* v. *Watson,* 290 S.W. 2d 40, 41-42 (Ky. 1956). The mineral grant in those deeds were for ". . . property, rights, and privileges, in, of, to, on, under, concerning and appurtenant . . . [to] All the coal, minerals, products, . . . [and] such of the standing timber as may be, or by the Grantee . . . be deemed necessary for mining." The Stearns deed is similar to the broad form deed in placing with the mineral owner ownership of "all coal" that is "in, upon, or under" the surface; the deed also expressly permits Stearns to use so much of the surface to extract its minerals as is "reasonable and, according to recognized good practice, necessary for the purpose."

> of necessity or convenience, unless this power is exercised oppressively, arbitrarily, wantonly, or maliciously, in which event the surface owner may recover for damages so occasioned.

And in *Martin, supra,* 429 S.W. 2d at 397, the Kentucky court stated:

> Whether or not the parties actually contemplated or envisioned strip or auger mining is not important — the question is whether they intended that the mineral owner's rights to use the surface in removal of the minerals would be superior to any competing right of the surface owner.

After citing this authority, the lower court examined the language of the Stearns deed to determine whether the mineral estate was superior to the surface estate. In its analysis, the court recognized that the Kentucky case involving a mineral reservation most analogous to the Stearns deed was *Croley* v. *Round Mountain Coal Co.,* 374 S.W. 2d 852 (Ky. 1964). Both the *Croley* deed and the Stearns deed contained reservations of "all metaliferous minerals, coal, oil, gas and limestone in, upon and under the . . . land." The court in *Croley,* following *Buchanan,* held that this language meant the mineral estate was superior to the surface estate and strip mining was permissible. *See Id.* at 854.

Despite its recognition of the *Croley* holding, the lower court looked beyond the unambiguous language of the deed reservation saying such language was not dispositive but was only "evidence of the intent of the

parties as to which estate (mineral or surface) would be superior." 595 F. Supp. at 813; App. at 22a. Then, based solely upon a comparison of the Stearns deed to two deeds discussed in the Sixth Circuit case of *Peabody Coal Co.* v. *Pasco,* 452 F. 2d 1126 (6th Cir. 1971), the court ruled that the Stearns deed language did not reserve in Stearns the right to strip mining. Significantly, the Sixth Circuit in *Pasco* had discounted the ruling in *Croley,* deciding instead that the *Martin* case had weakened *Croley* substantially. *See* 452 F. 2d at 1131. However, the reasoning of the *Pasco* case was rejected by the Kentucky court in *Akers* and *Baker,* as explained *infra.*

(b) *Sixth Circuit:*

On appeal, in a decision rendered on April 21, 1987, the Sixth Circuit Court of Appeals upheld the district court opinion. The appellate court first declared that if *Croley* were the final word on the subject, as argued by Stearns, the court would "agree that Stearns' reservation of mineral rights would permit it to strip mine these acres without the necessity of securing the approval of the United States." 816 F. 2d at 282; App. at 7a. The appellate court, however, also stated its belief that the Kentucky cases of *Martin* v. *Kentucky Oak Mining Co., supra,* 429 S.W. 2d 395, and *Commerce Union Bank* v. *Kinkade,* 540 S.W. 2d 861 (Ky. 1976); *cert. den.* 430 U. S. 915 (1977), changed the focus of Kentucky law from *Buchanan* and *Croley.* 816 F. 2d at 282; App. at 8a.

In essence the Sixth Circuit felt that *Martin* and *Commerce Union* had impliedly overruled, or at least modified *Croley* and *Buchanan,* so that the right to strip mine was more difficult to find in deeds that were not standard "broad form" deeds. The Sixth Circuit believed that *Martin* and *Commerce Union* required a court to scrutinize all the language in a deed to determine whether the parties intended the mineral estate to be dominant over the surface estate. Accordingly, the court examined the provisions of the Stearns deed and concluded that even though Stearns reserved "all . . . coal in, upon and under" the land, the mineral estate was "subservient" to the surface estate. *Id.* at 283; App. at 9a.

The Circuit Court of Appeals also looked at KRS 381.940, declaring that if that statute were held unconstitutional, it would adhere to its affirmation of the district court based on the common law of Kentucky, but in the event the statute were held constitutional, it would affirm the district court on its alternative statutory ground. *Id.* at 283-84; App. at 11a.

Stearns' petition for rehearing of the appellate court's opinion was denied on June 2, 1987. App. 1a.

3. OPINION OF THE KENTUCKY SUPREME COURT

On July 2, 1987, one month after the final decision on rehearing by the Sixth Circuit in this case, the Kentucky Supreme Court, in the consolidated cases of *Akers* v. *Baldwin,* No. 85-SC-392-CL, and *Baker* v. *Wooten,* No. 85-SC-422-TG, issued its opinion on the constitutionality of KRS 381.930, *et seq. (Akers)* and

the status of the common law regarding the rights of mineral and surface owners *(Wooten)*. See App. 25a-80a. The Kentucky Supreme Court entered an exhaustive, landmark opinion which (1) held the mineral deed construction statute, KRS 381.930, *et seq.*, unconstitutional, (2) reaffirmed that portion of *Buchanan* (and *Croley*) which declares that owners of minerals have the right to strip mine, unless specifically excepted, because the mineral estate is necessarily dominant to the surface estate and (3) overruled that portion of *Commerce Union* which had required a provision-by-provision analysis of all deeds that were not broad form. *Akers and Wooten, supra* No. 85-SC-392-CL and 85-SC-422-TG at 21, 23, 32, 35; App. 46a, 47a, 58a, 45a.

In *Akers* and *Wooten,* the Kentucky Supreme Court clarified the seemingly conflicting interests between the mineral estate and the surface estate. The court declared that the mineral estate is necessarily the dominant estate because "there is inherent in the mineral estate a right of access in and through the surface to the minerals." *Id.* at 6; App. at 30a. The Kentucky Court, unlike the district court and the Sixth Circuit, recognized that in all cases of mineral severance the mineral estate must be the dominant estate, for otherwise no one would really own the minerals and the mineral holder's estate would be worthless.[7]

[7]As the Court noted, in Kentucky, " 'it has always been the law that the grant *or reservation* of minerals carries with it the right to use the surface for the purpose of removing the minerals.' " *Id.* at 17 *quoting Blue Diamond Coal Co.* v. *Neace,* 337 S. W. 2d 725, 727 (Ky. 1960); App. at 41a).

As the Kentucky court observed, "Of what value is a mineral if it cannot be mined?" *Id.* at 6; App. at 30a.

The Kentucky court in *Akers* and *Wooten* was not troubled by granting the mineral owner the benefit of his bargain and allowing him to extract the mineral by the means necessary for removal of the coal, including strip mining, even if that method was unknown at the time of the conveyance. The court observed that it "can be argued that the parties in their wisdom recognized that fertile minds will always seek and achieve new ways of doing things, and therefore generally, if not specifically, contemplated new mining techniques which were faster, cheaper and better." *Id.* at 23; App. at 46a. The court was bothered, however, by cases allowing mineral owners to destroy the surface estate and not recompense the surface owner for loss of use of his estate because of the presence of a waiver of damages provision in the deed. In *Akers* and *Wooten,* therefore, the court overruled the portion of *Buchanan* that allowed the surface owner to collect damages only for oppressive, arbitrary, wanton or malicious conduct. The new rule, as stated in *Akers* and *Wooten,* is that "whenever the mineral rights under a broad form deed include the right to use the entire surface to extract the minerals, the mineral owner may do so, but must respond to the surface owner for all damages to that estate." *Id.* at 28; App. at 52a.

The case of *Akers* and *Wooten* (like *Buchanan*) involved a so-called "broad form" deed. However, in analyzing the history of Kentucky law regarding the rights of surface and mineral owners, the Kentucky Supreme Court also discussed deeds which were not "broad form", including *Croley* v. *Round Mountain Coal Co., supra,* 374 S.W. 2d 852, (the case which the Sixth Circuit said "would permit [Stearns] to strip mine" if it were still good Kentucky law). 816 F. 2d at 282; App. at 7a. As explained, the Sixth Circuit did not follow *Croley* because of ostensibly modifying language in *Martin* v. *Kentucky Oak Mining Co., supra,* 429 S.W. 2d 395, and *Commerce Union Bank* v. *Kinkade, supra,* 540 S.W. 2d 861. These cases arguably allowed a surface estate to be the dominant estate if the deed were not broad form, *i.e.* did not contain all-encompassing language as to the mineral owner's right to use the surface. *Id.* However, in *Akers* and *Wooten,* the Kentucky Court, noting the inconsistency between *Commerce Union* and cases like *Buchanan* and *Croley, expressly* overruled *Commerce Union*[8] to the extent that is was inconsistent with the court's determination; *i.e.,* that when the surface and mineral estates are severed the mineral estate is the dominant estate and strip mining is permissible, but

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[8]Significantly, the *Commerce Union* opinion quoted with approval language from the Sixth Circuit case of *Peabody Coal Co.* v. *Erwin,* 453 F. 2d 398 (6th Cir. 1971), a case that was a companion to the *Pasco* decision.

the mineral owner must respond in damages for all injuries to the surface.[9]

In summary, therefore, the newly-issued Kentucky court opinion in *Akers* and *Wooten* has shown the district court and the Sixth Circuit to be clearly wrong in their interpretation of Kentucky law. As noted, the Kentucky Supreme Court expressly recognized and gave effect to the rule of *Croley* and *Buchanan* (that in severed estates the mineral estate is dominant) while expressly disavowing the contradictory portions of *Commerce Union*. The Sixth Circuit, on the other hand, had earlier ruled that under the Stearns deed the surface estate owned by the United States is dominant, and the federal court supported its opinion with *Commerce Union*. Given this sequence of events, and the Sixth Circuit's own recognition that if the rule of *Croley* remained the law of Kentucky, which it clearly does, Stearns would win, it can only be concluded that Stearns has been denied the benefit of an accurate determination of its very valuable property rights because of the timing of the opinions issued by the two courts.

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[9]In his separate opinion (concurring-in-part and dissenting-in-part), Justice Stephenson aptly commented, "It is gratifying that, at long last, this Court has taken the trouble to read *Buchanan* and recognize the holding there is that ownership of the coal gives the right to strip mine. This recognizes the myth of the 'broad form deed' as not being the genesis of the right to strip mine." *Akers* and *Wooten*, *supra* (Stephenson Op. at 2); App. at 62a. Justice Stephenson thus believed much of the confusion in Kentucky law, including *Commerce Union*, arose from a "mistaken premise that the 'broad form deeds' gave this power to strip." *Id.*

II. REASONS WHY PETITIONER'S REQUEST SHOULD BE GRANTED

Stearns asks this Court to either accept its petition for writ of *certiorari* or, alternatively, to remand this case to the Sixth Circuit Court of Appeals for reconsideration if its opinion in light of *Akers* and *Wooten* opinion. This request should be granted for the following reasons:

1. There can be no real doubt after the Kentucky Supreme Court's decision in *Akers* and *Wooten* that this case was decided under an incorrect interpretation of Kentucky law — the law the federal courts are bound to apply. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (1938). It was just this result that Stearns sought to avoid by asking the district court to stay its decision until the Kentucky Supreme Court entered its decision in *Akers* and *Wooten,* a decision destined to be one of the most important ever rendered by the Kentucky Supreme Court.

It is well-recognized that "[i]f during the pendency of a case in the federal courts state law changes or a previously open or ambiguous question of state law is resolved or clarified, the federal courts must take this into account and reverse or revise their determination of state law accordingly." Wright & Miller, *Federal Practice and Procedure: Jurisdiction* § 4507 (1982). *See also, Maryland Casualty Co.* v. *Hallatt,* 326 F. 2d 275, 277 (5th Cir.) *cert. den.* 377 U. S. 932 (1964), wherein that court vacated a judgment decided under an erroneous understanding of state law, stating that

"under the total circumstances it is our duty to conform our decision to the supervening decision of the State Court, such decision being under *Erie* the right decision." Because of the timing of the decisions involved, the federal courts in this case will not have the opportunity to rectify their mistake unless directed to do so by this Court.

Stearns recognizes that each petitioner to this Court feels it has been wronged by the lower court. Stearns submits, however, that the circumstances of this case uniquely establish that the petitioner has been subjected to an incorrect ruling by the lower court. Action by this Court, by either accepting this petition for *certiorari* or by remanding the case to the Sixth Circuit for reconsideration in light of *Akers* and *Wooten,* is the only way this injustice can be corrected.

2. The effect of the ruling of the Sixth Circuit is to permit the United States to acquire property rights in 1987 which it did not pay for in 1937. There was no doubt that in 1937 the ownership of the mineral estate included the right to surface mine. Indeed, in 1936, one year prior to the execution of the Stearns deed, the Kentucky Court in *Rudd* v. *Hayden,* 265 Ky. 495, 97 S.W. 2d 35, 37 (1936), had declared: "Furthermore, the term 'mine' is not limited to those cases where a shaft is sunk into the ground, but may include 'open cut', 'strip', or 'hydraulic' methods of mining." The courts of this land are intended to keep government from encroaching on the rights of private individuals — and one of the rights most preciously guarded is

the right to own property. The United States, when acting solely in its proprietary capacity, should not be permitted to acquire private rights without compensation when, under state law, those rights are clearly established as belonging to the mineral owner.

3. Unless *certiorari* or remand is granted, the long-standing and revered principle of judicial uniformity as set forth in *Erie Railroad Co.* v. *Tompkins, supra,* 304 U. S. 64, will be substantially eroded — at least when the United States is a party. Here state law, which is supposed to control this dispute, says Stearns should prevail, yet the federal courts have misconstrued that law to place property rights in the United States that were not originally acquired. This result grants the United States a distinctively unfair advantage when it is in a dispute with one of its citizens. Indeed, because of the doctrine of sovereign immunity, the United States under the Sixth Circuit opinion can engage in forum shopping — choosing to go into the Kentucky court when deemed advantageous to do so, but choosing the federal route when different rights are in issue. Yet the *Erie* doctrine is designed to preclude this result,[10] and the Sixth Circuit should at least be given the opportunity to bring its opinion in line with the new Kentucky authority before the *Erie* doctrine is eroded.

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[10] In *Erie,* this Court noted that the discrimination which had resulted from having different laws in different forums was "far-reaching", even to the extent that "state decisions construing local deeds, mineral conveyances, and even devises of real estate, were disregarded." 304 U.S. at 76.

4. Unless reversed or remanded, an irreconcilable conflict of laws will exist within the same circuit court of appeals. This is because under the *Stearns* decision the mineral estate is not deemed to be dominant, while under the *Akers* and *Wooten* case, the surface estate is deemed to be dominant. Of course, the *Akers* and *Wooten* opinion was written at the request of the federal district court for the eastern district of Kentucky, and the Kentucky court's determination is controlling in that federal district court. This inconsistency within the same district creates an intolerable condition, though, because in every federal case similar to this one, one party or the other will seek to get the issue in controversy certified to the Kentucky court. Such a result is judicially inefficient and certainly not contemplated by the *Erie* doctrine.

5. The Sixth Circuit ruling is inconsistent with the policy of the Weeks Act of 1911, 36 Stat. 961, ch. 186, which permitted the creation of the national forest system. Currently, a substantial portion of land located within the boundaries of the national forests is privately owned, and the purpose of the Weeks Act, as supplemented by the Clark-McNary Act of 1924, 43 Stat. 653, ch. 348, was to permit the United States to acquire as much land as possible within the boundaries of the forest as cheaply as possible. However, the Act contemplated that private owners would receive compensation for their land, and that they would be dealt with fairly and openly. Under the Sixth Circuit's ruling, though, private parties are put on notice that

the United States might sometime far in the future be willing to reneg on their deal, with judicial approval, so that the mineral rights initially reserved by the private party would be rendered worthless because they could not be exercised. It is respectfully suggested that the government owes its citizens a higher duty than that demonstrated here. If not, other landowners certainly will become wary of dealing with their government, and are likely to be far more hesitant about permitting their land to become a part of the national forest system.

6. Finally, this Court should look at this case with extra scrutiny, for the circumstances are indeed peculiar. Here, the federal appellate court has construed a deed under state law to place certain property rights in the United States when those rights should properly have been left with the private party. This Court has long recognized the delicate balance involved when federal courts are called upon to mediate disputes involving state law. When the dispute is between the federal government and a private citizen, it is even more urgent that the balance be maintained and that the outcome of the case not be influenced by the fact that it was decided in the federal forum. Accordingly, given the new Kentucky authority, this case should at least be remanded to the Sixth Circuit for reconsideration of its April 21, 1987 opinion. *Cf., Henry* v. *City of Rock Hill,* 376 U. S. 776 (1964).

III. CONCLUSION

For the foregoing reasons, The Stearns Company requests that the United States Supreme Court grant its petition for writ of *certiorari* or, in the alternative remand this action to the United States Court of Appeals for the Sixth Circuit for reconsideration of its opinion in light the Kentucky opinion found in *Akers* and *Wooten, supra.*

Respectfully submitted,

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APPENDIX

APPENDIX

No. 86-5560

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

STEARNS COAL AND LUMBER COMPANY, - - - - - *Defendant-Appellant.*

ORDER — Filed June 2, 1987

Before: ENGEL, KRUPANSKY and GUY, Circuit Judges.

Appellant having filed a petition for rehearing with this court, and this court having considered said petition and finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing be and is hereby DENIED.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
Clerk

No. 86-5560.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

STEARNS COAL AND LUMBER COMPANY, - - - - - *Defendant-Appellant.*

Argued March 13, 1987.
Decided April 21, 1987.

Suit by mineral owner for declaratory judgment as to its right to strip mine coal within national forest was consolidated with suit by the United States for declaratory relief to prevent mineral owner from strip mining coal. The United States District Court for the Eastern District of Kentucky, Eugene E. Siler, Jr., Chief Judge, 595 F. Supp. 808, entered judgment for the United States, and mineral owner appealed. The Court of Appeals, Engel, Circuit Judge, held that grantor which reserved mineral rights in a deed of surface land to the United States did not have right to strip mine coal within national forest under common law of Kentucky when reading of mineral deed did not otherwise indicate that parties intended that mineral owner's right to use surface in removal of minerals would be superior to any competing right of the United States as surface owner and, since some rights were preserved in surface owner, it followed that grantor, as owner of mineral estate, did not retain right superior to any conveyed to the United States.

Affirmed.

Louis DeFalaise, U.S. Atty., Lexington, Ky., Jane E. Graham (argued), for plaintiff-appellee.

Winfrey P. Blackburn, Jr., Bruce F. Clark (argued), Stites and Harbison, Frankfort, Ky., for defendant-appellant.

Before ENGEL, KRUPANSKY and GUY, Circuit Judges.

ENGEL, Circuit Judge.

The issue for decision is whether under Kentucky law Stearns Coal and Lumber Company, under a reservation of mineral rights in a deed of surface land to the United States, may engage in strip mining when the deed reserving its mineral rights is silent on the subject. The district court held that Stearns could not strip mine without first securing permission of the surface owner, the United States. We affirm.

In 1937, Stearns conveyed by deed to the United States the surface rights in 46,842.4 acres in Wayne and McCreary Counties, Kentucky, reserving certain mineral rights. The purchase price was $135,500.84, or $2.85 per acre. The government purchased the land for inclusion in a national forest under the Weeks Act of 1911, 36 Stat. 961, ch. 186, as amended by the Clarke-McNary Act of 1924, 43 Stat. 653, ch. 348. Stearns had not conducted strip mining on this property at that time, nor did it seek to do so until 1954, when it applied to the Secretary of Agriculture under its mineral rights reserved in the deed. When the Secretary denied permission, Stearns did not again seek to strip mine until 1976, when it desired to strip mine a 19-acre tract partially within the Daniel Boone National Forest. The Forest Service denied approval on the grounds that (1) Stearns did not have a legal right to strip mine under the mineral reservation contained in the deed; and (2) the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et eq.*, prohibited this activity on national forest land.

After receiving a state permit to mine coal, Stearns brought this suit in May 1978 seeking, *inter alia,* declaratory relief giving it the right to strip mine coal within the national forest under its mineral reservation. Afterwards, in the same year, the United States brought suit against Stearns for declaratory relief to prevent Stearns from strip mining coal under the property despite Stearns' reservation of mineral rights.

The actions were consolidated,[1] and by agreement of the parties, the district court limited its decision to the deed construction issue, and did not consider any federal statutory questions. Following a bench trail, the district court, in an opinion published at 595 F. Supp. 808 (E.D. Ky. 1984), held that the reservation did not preserve Stearns' right to strip mine. Its decision rested upon Kentucky case law, and not on KRS 381.940, discussed *infra.* In the alternative, the court decided that the statute, if applicable, would require the same result. The court stayed entry of judgment, based on pending litigation concerning federal and state law questions. In 1986, the court entered final judgment after determining that there was no longer any reason to continue to stay. This appeal followed.

The parties and the district court agree that the deed is unambiguous and it therefore will be construed according to its terms without reference to any extrinsic evidence of the circumstances surrounding the deed, such as other deeds the government entered into or minutes from meetings of the National Forest Reservation Commission. The parties also agree that the law of Kentucky is controlling. The portions of the deed which form the basis of our decision follow:

> RESERVING, however, from the operation of this conveyance, unto the party of the first part [Stearns], its

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[1]Jurisdiction was predicated upon 28 U.S.C. § 1345.

successors or assigns, the unrestricted use and control for all legal purposes until same are abandonded or surrendered by vendor, or its assigns, of approximately forty (40) acres, ... at the mouth of each of the following mines: #1, #4, #11, #15 and #16, Cooperative, Fidelity and Grassy Fork. These reserved areas include mine openings, tipples, trucks, bridges, sub-station and shops.

* * * * * *

There is, also, RESERVED, the right to the use of all existing or necessary rights-of-way over the land conveyed herein for the removal of timber hereinafter reserved, and the right to use existing rights-of-way, and other rights-of-way as approved by the Forest Officer, over the land herein conveyed for the removal of any timber now or hereafter owned by the Stearns Coal and Lumber Company.

* * * * * *

There is, also, RESERVED, all metaliferous minerals, coal, oil, gas and limestone in, upon and under the described tracts of land; PROVIDED, however, that all operations from mining and removing same same (sic) shall be done and carried on in accordance with the following rules and regulations prescribed by the Secretary of Agriculture, viz:

(2) In prospecting for, and in mining and removing minerals, oil, or gas, and in manufacturing the products, thereof, only so much of the surface shall be occupied, used or disturbed as in (sic) reasonable and, according to recognized good practice, necessary for the purpose.

(3) In underground operations all reasonable and usual provisions shall be made for the support of the surface, and to that end the tunnels, shafts, and other workings shall at all reasonable times be open to in-

spection and examination by the forest officers and mining experts or inspectors of the United States.

* * * * * *

(5) The method commonly known as "Hydraulic Mining" is positively prohibited.

(6) Payment at the usual rates charged in the locality for sales of National Forest timber, and timber products of the same kind or species, shall be made to the United States for all timber, undergrowth or young growth, cut, destroyed, or damaged in prospecting, mining, drilling, or removing minerals, oil, or gas, or in manufacturing products therefrom, and in the location and construction of buildings or works of any kind for use in construction therewith.... No timber, undergrowth, or reproduction shall be unnecessarily cut, destroyed, or damaged.

The deed also provides that buildings and other structures and improvements may be built upon the land if a forest officer approves their locations. They must be removed after completion of the mining.

The language of this deed varies from many "broad form deeds" entered into in Kentucky during the early part of this century. In those deeds, under which the mineral owner could mine virtually without limitation, the surface estate has been held subservient to the dominant estate of the mineral holder. *Buchanan v. Watson,* 290 S.W. 2d 40 (Ky. 1956). In *Buchanan,* the Kentucky Court of Appeals held that since the mining company had the right to remove "all the coal" "in ... on, and under" the land, the deed did not preclude the company from engaging in the only feasible process of extracting the coal. *Buchanan* remains good law as to the interpretation of broad form deeds. *Martin v. Kentucky Oak Mining Co.,* 429 S.W. 2d. 395, 399 (Ky. 1968).

[1] However, while Kentucky courts have sometimes permitted strip mining under deeds that grant overwhelming mining rights but are narrower than broad form deeds, they have not construed *Buchanan* as controlling for deeds such as the one in question. For a time, the determinative question for deeds similar to the present one was whether the parties contemplated that strip mining would be permitted according to the particular language of the deed. For example, in *Croley v. Round Mountain Coal Co.*, 374 S.W. 2d. 852 (Ky. 1964), the court allowed the mineral estate owner to strip mine based on a deed containing certain clauses virtually identical to ones present in this deed. The *Croley* deed reserved all coal, oil, gas, stone, and water, "in, on, or under" the land. The court held that since *all* coal could not be removed through underground mining, and since the removal of stone normally would require substantial surface destruction, the parties must have intended that the minerals could be removed by any recognized method. *Id.* at 853. As in *Buchanan*, the purpose of the conveyance was to allow the mineral estate owner to remove coal from below the surface, and denying that right by foreclosing the only feasible removal process would defeat the purpose of the deed. *Id.* Stearns relies heavily upon *Croley*, and were it the final word on the subject, we would agree that Stearns' reservation of mineral rights would permit it to strip mine these acres without the necessity of securing the approval of the United States. However, we believe that the law of Kentucky on this subject has changed substantially since *Croley*.

That change is reflected in the case that we consider dispositive, *Peabody Coal Co. v. Pasco*, 452 F. 2d 1126 (6th Cir. 1971). In that case, this court had to determine whether strip mining was permissible under two different deeds. The court noted that since *Croley*, the Kentucky Court of Appeals had decided *Martin v. Kentucky Oak Mining Co.*,

429 S.W. 2d 395 (1968), which shifted the analysis from whether the parties contemplated strip mining to whether the "parties to the deed intended that the mineral owner's right to use the surface in removal of minerals would be superior to *any* competing right of the surface owner." 452 F. 2d at 1132 (emphasis added). This court found that *Martin* did not rely either on the deed's "all coal" language, or "in, on and under" phrasing, contrary to *Croley*. This court's holding in the companion case, *Peabody Coal Co.* v. *Erwin*, 453 F. 2d 398, 399 (6th Cir. 1971) (per curiam), which reversed the district court because it "placed undue emphasis on *Croley* ...," indicates a clear rejection of the same talismanic argument advanced by Stearns in this case. The subsequent decision in *Commerce Union Bank v. Kinkade*, 540 S.W. 2d 861, 864 (Ky. 1976) (per curiam), confirms our belief that this court in *Pasco* and *Erwin* properly recognized a change in Kentucky law.

"Realizing the potential fact that no two grants of mining rights may be identical, it is necessary that a proper construction of such rights be confined to a deed-to-deed interpretation of clauses in a mineral deed which grant or modify mining rights." *Id.* at 863-64. We believe that the clauses in this deed do not indicate that the parties "intended that the mineral owner's rights to use the surface in removal of the minerals would be superior to any competing right of the surface owner." *Martin*, 429 S.W. 2d at 397; *Pasco*, 452 F. 2d at 1132. The second regulation contained in the deed demands that the mineral owner only disturb so much of the surface as is reasonable. The third regulation requires that in underground mining operations, Stearns make all reasonable and usual provisions for surface support, and open its tunnels for inspection and examination by forest officers or government inspectors. Finally, the fifth regulation prohibits the employment of hydraulic mining, and the sixth places limitations on the destruction of timber.

We disagree that permitting the company to disturb so much of the surface as is reasonable mandates subordination of the surface estate to the mineral estate. Under the provisions of this deed, strip mining would not be a reasonable use of the surface because the surface restrictions imposed upon Stearns indicate that the parties did not contemplate that Stearns could totally destroy the surface. Since some rights were preserved in the surface owner, it follows a *fortiori* that Stearns as owner of the mineral estate did not retain rights superior to any conveyed to the United States as surface owner.

Futhermore, although the third regulation refers only to underground mining, the surface owner's rights to support and inspection would be meaningless if Stearns could destroy the surface. The fifth and sixth regulations prohibiting hydraulic mining and limiting timber destruction also reflect the parties' intent that the surface not be destroyed. As in *Erwin,* the deed in the instant case "grants rights impliedly incident to underground mining, but ... does not indicate the intention of the parties that the mineral owner bought the right to destroy the surface, or that it was intended that the mineral owner's rights to use the surface would be superior to any competing right of the surface owner." *Erwin,* 453 F. 2d at 399; *Commerce Union Bank,* 540 S.W. 2d at 864. Accordingly, Stearns may not, as the owner of the subservient estate, commence strip mining operations without the permission of the owner of the dominant estate, the United States.

We are aware that Kentucky has enacted a statute, KRS 381.940, which, if constitutional, bears upon the question before us. That statute provides:

> In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and

> specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commerical coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate only for the purposes of coal extraction by the method or methods of commercial caol extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.

The constitutionality of this statute has been argued before the Kentucky Supreme Court in *Akers v. Baldwin,* Docket No. 85-SC-392-CL, but at this time remains undecided. The statute's constitutionality was challenged on the grounds of due process, equal protection, and the contract clause. The Kentucky Court of Appeals had declared a precursor to KRS 381.940 unconstitutional in *Department for Natural Resources and Environmental Protection* v. *No. 8 Limited of Virginia,* 528 S.W. 2d 684 (Ky. 1975).

[2] If KRS 381.940 is unconstitutional, we adhere to our holding affirming the district court based upon the common law of Kentucky. Judge Siler, however, also recognized that the statute might be applicable and constitutional, and wisely took evidence on the question whether strip mining was commonly known to be used in this area in 1937, when the deed was signed. He found that Stearns sold the surface rights to this land after incurring losses in its timber and underground coal mining operations during the depression. At the time of the conveyance, Stearns' timbering potential on this land had been virtually exhausted, and the company was ceasing its mining operations at several sites.

Although strip mining had been conducted in McCreary County many years before this conveyance, no surface mining operations were active in 1937. In fact, the strip mining methods that had earlier been used in McCreary County were not technologically feasible for use on this land because of its steep slopes and overburden. We accept as not clearly erroneous these factual findings, and hold that in the event KRS 381.940 is constitutional, the judgment of the district court may be affirmed on its alternative statutory ground that strip mining was not known to be commonly in use in this area of Kentucky when the deed was executed.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action Nos. 78-62 & 78-169 (Consolidated)

UNITED STATES OF AMERICA, - - - - *Plaintiff,*

v.

THE STEARNS COMPANY, - - - - *Defendant.*

JUDGMENT — Filed March 14, 1986

In accordance with the Memorandum of even date and of October 9, 1984, it is hereby

ORDERED AND ADJUDGED that the surface rights of the United States in the deed involved in this case are superior to the mineral rights of The Stearns Company, so The Stearns Company cannot engage in surface mining on the property listed in the deed involved without approval from the United States. The defendant, The Stearns Company, shall pay the costs of this action.

This is a final and appealable Order and there is no just reason for delay.

This 14th day of March, 1986.

(s) Eugene E. Siler, Jr.
Eugene E. Siler, Jr.
Chief Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action Nos. 78-62 & 78-169 (Consolidated)

UNITED STATES OF AMERICA, - - - - - *Plaintiff,*

v.

THE STEARNS COMPANY, - - - - - *Defendant.*

MEMORANDUM — Filed March 14, 1986

The Court has received the status reports from each of the parties herein. It appears that the Kentucky Supreme Court has already heard oral argument in *Akers* v. *Baldwin,* and *Baker* v. *Wooten* on October 23, 1985. However, there is no guarantee of when the decision will be issued. For that reason, the Court feels that it does not need to delay further the entry of a final judgment in this case, for the parties may have the United States Court of Appeals remand this case, if it is appropriate in line with any decision which the Kentucky Supreme Court renders in the meantime.

The United States has also withdrawn its request for the Court to rule as to whether Stearns possessed a valid existing right to mine the coal by the surface method, as it says now that the issue must be resolved first through the administrative process.

Therefore, the Court will enter a final judgment and the parties may take any appeal therefrom.

This 14th day of March, 1986.

(s) Eugene E. Siler, Jr.
Eugene E. Siler, Jr.
Chief Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

Civ. A. Nos. 78-62, 78-169.

UNITED STATES OF AMERICA, - - - - *Plaintiff,*

v.

THE STEARNS COMPANY, - - - - *Defendant.*

MEMORANDUM — Filed October 9, 1984.

SILER, Chief Judge.

In 1937, Stearns Coal and Lumber Company, now known as The Stearns Company ("Stearns") conveyed by deed to the United States 46,842.4 acres of land in several tracts in Wayne and McCreary Counties in Kentucky, reserving certain mineral rights. This land was purchased by the United States under the Weeks Act of 1911, as amended by the Clarke-McNary Act of 1924, as part of the Cumberland National Forest (now the Daniel Boone National Forest).

No efforts were made by Stearns to strip mine this property until some date before July 30, 1954, when it made an application with the Secretary of Agriculture to strip mine under the reservation of mineral rights in the deed if conveyance. That was denied on July 22, 1955, after a hearing before a citizens' Committee of Consultants on this issue of whether it would be in the public interest, but not on the question of whether there was a legal right to mine under the provisions of the deed.

Stearns made no further efforts to strip mine within the national forest until 1976 when it sought to strip mine

a nineteen acre tract of land partially within the Daniel Boone National Forest. This was again denied by the Forest Service because: (1) Stearns did not have a legal right to strip mine under its mineral reservation from the deed; and (2) the Surface Mining Control and Reclamation Act of 1977 prohibited such activity on national forest land. After Stearns received a state permit to mine the coal, it brought this suit in May, 1978, for declaratory and other relief that it had the right to strip mine coal within the national forest under its mineral reservation. Subsequently, in November, 1978, the United States brought suit against Stearns for declaratory relief that Stearns did not retain the right under the deed to strip mine coal under the property conveyed. These cases were consolidated for trial and ultimate decisions.

The study for, and eventual purchase of, the Cumberland National Forest in the late 1920's and into 1930 did not include the Stearns land, as Stearns was not interested in the sale of its property. However, as the depression years arrived, Stearns was having problems making a profit in its timber and underground coal mining operations. As a matter of fact, it was losing money in its mining operations. Stearns then sought the sale of the realty to the United States. Negotiations were formalized in October, 1935, and the deed which is the subject of this litigation was executed on December 18, 1937. The sales price for the surface rights to the government was $135,500.84, or $2.85 per acre.

The language in the deed was unambiguous, as asserted by all parties, but it is silent on the question of strip mining. Some pertinent provisions of this very lengthy deed are:

> RESERVING, however, from the operation of this conveyance, unto the party of the first part [Stearns], its successors or assigns, the unrestricted use and con-

trol for all legal purposes until same are abandoned or surrendered by vendor, or its assigns, of approximately forty (40) acres, . . . at the mouth of each of the following mines: #1, #4, #11, #15 and #16, Cooperative, Fidelity and Grassy Fork. These reserved areas include mine openings, tipples, trucks, bridges, substation and shops.

* * * * * * *

There is, also, RESERVED, the right to the use of all existing or necessary rights-of-way over the land conveyed herein for the removal of timber hereinafter reserved, and the right to use existing rights-of-way, and other rights-of-way as approved by the Forest Officer, over the land herein conveyed for the removal of any timber now or hereafter owned by the Stearns Coal and Lumber Company.

* * * * * * *

There is, also, RESERVED, all metaliferous minerals, coal, oil, gas and limestone in, upon and under the described tracts of land; PROVIDED, however, that all operations for mining and removing same same (sic) shall be done and carried on in accordance with the following rules and regulations prescribed by the Secretary of Agriculture, viz:

* * * * * * *

2. In prospecting for, and in mining and removing minerals, oil, or gas, and in manufacturing the products, thereof, only so much of the surface shall be occupied, used or disturbed as in (sic) reasonable and, according to recognized good practice, necessary for the purpose.

* * * * * * *

5. The method commonly known as "Hydraulic Mining" is positively prohibited.

6. Payment at the usual rates charged in the locality for sales of National Forest timber, and timber products of the same kind or species, shall be made to the United States for all timber, undergrowth or young growth, cut, destroyed, or damaged in prospecting, mining, drilling, or removing minerals, oil, or gas, or in manufacturing products therefrom, and in the location and construction of buildings or works of any kind for use in connection therewith. . . . No timber, undergrowth, or reproduction shall be unnecessarily cut, destroyed, or damaged.

Other provisions of the deed provide that every person desiring to prospect for minerals or to mine must exhibit written evidence of the right to mine on the property, all structures for mining have to be approved by the forest officer, and those buildings and structures are to be removed after the mining is completed. Stearns was also responsible for cleaning up after mining operations and for any fires directly or indirectly caused by its activities.

Stearns' short-term timbering potential on the tracts in the deed had virtually been exhausted, and it was shutting down its mining operations at several locations, when the deed was signed. Although there was knowledge at that time regarding strip or surface mining, Stearns only employed underground mining. Very little surface mining had been conducted in the counties wherein these tracts lay and in adjacent counties, and this type of strip mining had been a very crude type of operation and relatively unprofitable. No surface mining was in existence in this area at the time of the deed, although there had been some in the vicinity of Lily in Laurel County and Silerville (now

Strunk) in McCreary County. Both had been discontinued long before this conveyance.

There also had been strip mining in other distant areas, such as Western Kentucky, Ohio and Illinois, before 1937, but the topography of the land conveyed in the 1937 deed was quite different from those areas where stripping had gone on, and the Stearns land was not suitable for any strip mining methods which had been conducted prior to 1937, as there was too much overburden and the slopes too steep for commercially feasible and efficient extraction of the coal. All of the prior strip mining had been conducted on relatively flat land, using mechanical shovels or drag lines with much less overburden than was found in these tracts of land.

The purpose of the purchase and the policy of the United States in acquiring the national forest land were for timber production and the protection of navigable waters and environs. There was then no recreational or park policy for the national forests.

During negotiations for the sale of the surface rights, there was no mention, written or oral, between the parties, involving strip mining,[1] except for the proviso prohibiting hydraulic mining, which is a type of very destructive surface mining, using water instead of a machine. In areas such as Ohio where the United States acquired surface

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[1]There was evidence that H.C. Gillis, a late law partner of this Judge's father, told William A. Kinne, one of Stearns' negotiators on the deed, that strip mining would be allowed under the deed, as it only prohibited hydraulic mining. This appears to be hearsay, but it probably is admissible under Rule 803(3), Federal Rules of Evidence, to prove the intent of Stearns through its lawyer. Nevertheless, the Court does not give much weight to that statement, not because it doubts the credibility of N.B. Perkins, the witness who overheard the conversation, but because the statement does not coincide with other evidence concerning intent.

rights for the national forests, it took chances that the land would never be strip mined, although that later came about. However, in the sale and acquisition of the property here, it was never the intention of the parties that the mineral owner's (Stearns') rights to use the surface in the removal of the minerals would be superior to any competing right of the surface owner (United States). They certainly did not contemplate or envision that these tracts would be mined by stripping or augering, and it was not so provided in the deed or in any other correspondence between the parties before the deed was signed.

By agreement of the parties, Kentucky law is applicable. Since the time of the trial, the Kentucky General Assembly has passed a new statute, KRS 381.940, which provides:

> In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate only for the purposes of coal extraction by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.

This new law appears to be dispositive of this case, if it is constitutional, for there are no express or specific terms in the deed pertaining to the method of coal extraction to be used. Thus, as there is no clear and convincing evidence to the contrary, the Court must hold that the intention of the parties was that the coal was to be extracted only by methods commonly used in the area affected at the time the instrument was executed, and the mineral estate was dominant to the surface estate *only* for the commonly known methods of commercial coal extraction, that is, for underground mining. Although there was some slight history of surface pit mining, there was no history of strip mining that would be considered commonly known to be used in the area for commercial coal extraction. Thus, under the statute, the claim of Stearns must fail.

Nevertheless, as the statute might later be found to be invalid, the Court will make further conclusions on the law as developed prior to 1984.

In 1956, the Kentucky Court of Appeals held in *Buchanan* v. *Watson,* 290 S.W. 2d 40, 43 (Ky. 1956), that under the "broad-form" or Mayo deed (named for John C.C. Mayo, the man who got rich in Kentucky from obtaining mining leases in the early part of the century) conveying minerals, the owner of the mineral rights:

> has the paramount right to the use of the surface in the prosecution of its business for any purpose of necessity or convenience, unless this power is exercised oppressively, arbitrarily, wantonly, or maliciously, in which event the surface owner may recover for damages so occasioned.

It also held that even where the parties had not contemplated a particular type of mining (strip or auger), where the deed was silent on the method of extraction, it did not preclude the mineral holder from utilizing the only feasible

method of extracting the coal. *Id.* The decision was not new law; it just applied old principles to a new factual situation. *See Blue Diamond Coal Co.* v. *Neace,* 337 S.W. 2d 725 (Ky. 1960); *but see Commerce Union Bank* v. *Kinkade,* 540 S.W. 2d 861, 864 (Ky. 1976) (Stephenson, J., concurring).

That maxim from *Buchanan* was upheld for years up to the present. *See, e.g., Martin* v. *Kentucky Oak Mining Co.,* 429 S.W. 2d 395 (Ky. 1968). The latter decision, responding to many briefs from environmental groups on the question, said, "[C]onversation is not in issue," *id.* at 397, as states such as Pennsylvania and West Virginia, which do not recognize rights to strip and auger mines for holders of minerals under "broad-form" deeds, still allow strip and auger mining. It also followed *Buchanan* v. *Watson, supra,* when it stated at 397:

> Whether or not the parties actually contemplated or envisioned strip or auger mining is not important—the question is whether they intended that the mineral owner's rights to use the surface in removal of the minerals would be superior to any competing right of the surface owner.

On the other hand, the parties agree that the deed here is not a "broad-form" deed but is more narrowly written. In construing a deed, if there is no ambiguity in it, it will be strictly enforced according to its terms. If there is any ambiguity, it will be construed most strongly against the grantor, "both upon the grant of the property and the rights and privileges specified," *Buchanan* v. *Watson, supra* at 43, quoting from *McIntire* v. *Marian Coal Co.,* 190 Ky. 342, 227 S.W. 298, 299 (1921). (In that case, the grantor conveyed the minerals. In this case, the grantor conveyed the surface rights.)

Nevertheless, even when the grantor conveys the surface rights, if its reservation of minerals is broad enough, it may strip or auger coal upon the land, *see Croley* v. *Round Mountain Coal Co.,* 374 S.W. 2d 852 (Ky. 1964), especially when the mineral reservation includes stone, water and all minerals and the grant was made when strip mining was quite common. *See Peabody Coal Co.* v. *Pasco,* 452 F. 2d 1126, 1131 n. 3 (6th Cir. 1971). Although Stearns makes much of the language in the deed that it reserved "all metaliferous metals, coal, oil, gas and limestone *in, upon and under* the . . . land (emphasis added)," as that seemed to be a factor in *Croley* v. *Round Mountain Coal Co., supra,* nevertheless, in *Peabody Coal Co.* v. *Pasco, supra* at 1131-1132, it was held, in analyzing Kentucky law, that such a phrase was not dispositive of the case, but was, like the words, "necessary or convenient," from *Buchanan,* evidence of the intent of the parties as to which estate (mineral or surface) would be superior. In *Pasco* the 1919 deed was held to preclude strip and auger mining, but a 1914 deed allowed it. In viewing the language from those deeds, it is obvious that the language in the Stearns deed does not follow either. The language in the Stearns deed was not so broad as the 1914 deed which included a waiver of damages to the surface and allowed all rights and privileges in and about the land on the surface or underneath the surface incident to and required by successful and profitable mining. *See also Peabody Coal Co.* v. *Erwin,* 453 F. 2d 398 (6th Cir. 1971). The *Erwin* analysis was followed in *Commerce Union Bank* v. *Kinkade, supra* at 864, as the court held that the language in a mineral deed did not allow strip mining.

One additional point needs to be discussed. Stearns has argued that when the deed specifically prohibited hydraulic mining, by following the maxim of *expressio unius est exclusio alterus,* the intent of the parties was to allow any

other form of mining by failing to exclude it specifically. Although the maxim may be used in certain instances, as stated in *Ford* v. *United States,* 273 U.S. 593, 611, 47 S. Ct. 531, 71 L. Ed. 793 (1927), it:

> properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment.

That court went on to quote Lord Justice Lopes from *Colquhoun* v. *Brooks,* 21 Q.B.D. 52, 65, that:

> It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

Ford v. *United States, supra* at 612, 47 S. Ct. at 537; *cf. Durnin* v. *Allentown Federal Savings and Loan Ass'n,* 218 F. Supp. 716, 719 (E.D. Pa. 1963).

In the case at bar, it is quite evident that the parties never discussed mining other than hydraulic methods, so the omission of other methods in the deed has no value in the construction of the instrument.

No ruling is being made on which party has the burden of proof, as that is not a factor in this decision. Both parties have presented proof and the Court has found for the United States by a preponderance of the evidence.

Therefore, as the Court finds from all the language in the deed that the parties did not intend that Stearns would have superior rights to extract the minerals over the sur-

face rights of the government, *cf. Greenwood Land & Mining Co.* v. *Bergland,* London Civ. No. 78-626 (E.D. Ky. Oct. 23, 1978) (unpublished opinion by Moynahan, C.J.), *appeal pending; United States* v. *Polino,* 131 F. Supp. 772 (N.D. W.Va. 1955) (West Virginia law), the Court declares the surface rights of the United States in the deed involved are superior to the mineral rights of Stearns, so Stearns cannot engage in surface mining on the property listed in the deed involved without approval from the United States.

RENDERED: JULY 2, 1987
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

85-SC-392-CL

EVERETT AKERS Et Al. - - - - - - *Plaintiffs*

v.

CHARLOTTE BALDWIN Et Al. - - - - *Defendants*

U. S. District Court
Eastern District of Kentucky
No. 84-88

AND

FALCON COAL COMPANY
Et Al. - - - - - *Intervening Complainants*

AND

No. 85-SC-422-TG

MATTHEW BAKER Et Al. - - - - - *Appellants*

v.

ELIZABETH WOOTEN Et Al. - - - - - *Appellees*

Appeal from Perry Circuit Court
Honorable Calvin N. Manis, Judge
83-CI-429

BEST AVAILABLE COPY

OPINION OF THE COURT BY CHIEF JUSTICE STEPHENS CERTIFYING THE LAW REVERSING AND REMANDING

On this appeal we again consider the legal effect of the so-called "broad form deeds" on the conflicting rights of the owners of the surface to land and the owners of the mineral rights under that land.[1]

Specifically, we reexamine the doctrine set forth in the seminal case of *Buchanan* v. *Watson*,[2] which allows mineral owners to strip mine[3] with little or no restriction or liability to the owner of the surface, even to the extent of absolute obliteration of the surface and all its appurtenances. We also address the constitutionality of KRS 381.930 to 381.945 (1984), the ultimate purpose of which is to prohibit strip mining under the provisions of broad form deeds.

PROCEDURAL AND FACTUAL BACKGROUND

Appellants Akers and others filed suit in the United States District Court for the Eastern District of Kentucky against Charlotte Baldwin, Secretary, Natural Resources and Environmental Protection Cabinet, Commonwealth of Kentucky. An injunction was sought to prevent Baldwin from issuing strip mining permits where the right to strip

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[1]A description of this type deed appears later.

[2]Ky. 290 S.W. 2d 40 (1956) (hereinafter referred to as *Buchanan*).

[3]For the purposes of this opinion, the phrase "strip mine" will encompass all types of mining wherein the surface of the earth is removed, by any of several methods, to enable the removal of the minerals lying thereunder. Other general terms, such as "surface mining", "auger mining", etc., may be used interchangeably.

mine was claimed under an instrument which severed the minerals and the surface, and where said instrument did not specifically give the mineral owner the right to mine in such manner, and where the surface owner objected to, or did not consent to, such method of mining.[4] The District Court entered a preliminary injunction, partially granting the relief sought. Falcon Coal Company and others filed an intervening complaint, challenging the applicability and constitutionality of KRS 381.930-945 (1984) and claiming that such dispute between the mineral owner and the surface owner does not constitute a legal basis for withholding a strip mining permit. The District Court, pursuant to CR 76.37, requested this Court to certify the constitutional challenge to KRS 381.930 *et seq.* We granted this request.

In the second case, *Baker* v. *Wooten,* appellant Baker, plaintiff below, is the lessee of the mineral rights of a 427 acre tract of land in Perry County. Appellees Elizabeth Wooten and her children and their spouses are the owners of the surface rights to a portion of that land. Baker's lessors trace their title to the coal and other minerals to a 1910 deed which severed the mineral estate from the surface estate. Baker was engaged in strip mining, with a valid permit, on land adjacent to the property owned by appellees. Appellees denied Baker permission to enter on the surface of their property to do geological work prior to the beginning strip mining operations thereon.

Baker filed an action in the Perry Circuit Court, seeking a declaration of rights and injunctive relief which would

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[4]The premise of this lawsuit is the claim that the Federal Surface Mining Control and Reclamation Act of 1977 (PL 95-87) (30 U.S.C. 1201 et seq.) forbids the issuance of such a permit until any dispute has been decided by a state court. See 30 U.S.C. 1257(b)(9).

enable him to strip mine on the Wooten property. When the lawsuit was filed there was no legislation in Kentucky which specifically addressed the construction and interpretation of mineral severance deeds. Baker moved for a summary judgment, claiming that existing Kentucky common law gave him the absolute right to strip mine. The Wootens filed a cross-claim and a motion for summary judgment, claiming that KRS 381.930-945[5] prevented their property from being strip mined. The trial court declared the statute to be constitutional and, following an evidentiary hearing, determined that when the 1910 severance deed was recorded there was no strip mining in the vicinity. Therefore, the trial court reasoned, under the terms of the statutes the owner of the mineral rights or his successor (Baker) could not strip mine on the Wooten property. A notice of appeal was filed by Baker in the Kentucky Court of Appeals. Following this, the appellees filed a motion requesting this Court to transfer the appeal.

We granted the motion and, *sua sponte,* consolidated the two cases. We also directed that, in addition to the questions presented in the certification request and in the *Baker* appeal, the parties should address whether a standard broad form deed gives the owner of the mineral rights the right to extract coal by surface mining, as held in *Buchanan.*

CONTENTIONS OF THE PARTIES

Not surprisingly, Falcon Coal Company and other coal companies, as intervenors in *Akers* v. *Baldwin,* joined with the appellant in the case of *Baker* v. *Wooten* in urging that KRS 381.930-945 are unconstitutional and that *Buchanan*

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[5]KRS 381.930-945 was enacted during the litigation before the Perry Circuit Court.

is correct and should not be overruled or disturbed. Equally predictably, Baldwin and Akers joined with Wooten in advocating the constitutionality of the questioned statutes and in urging the overturn of *Buchanan* and its progeny.

In this opinion we will first consider the issues relative to the respective and often conflicting rights of the owners of the surface of the land and the owners of the minerals that lie under that surface. In so doing, we will perforce reconsider our decision in *Buchanan*. Secondly, we will examine the constitutionality of the Kentucky General Assembly's attempt to deal with the same issue in the instance of broad form deeds.

The genesis of the conflict between the owner of the surface and the owner of the minerals thereunder is the well-established legal doctrine that surface rights and mineral rights can be separate and distinct legal estates in land. The minerals are legally distinct from the surface under which they lie. Such mineral estates are said to be "severed" from the surface. *Duncan* v. *Mason,* Ky., 39 S.W. 2d 1006 (1931); see 4 D. Vish, *Coal Law and Regulation,* Section 80.01 (1983) (hereinafter cited as Vish).

The severance of the minerals and the surface can be achieved by a lease of the mineral rights or by a deed which creates a fee simple title to the minerals. Such separate estate can also be created by the sale of the surface, with a reservation of the minerals by the grantor.[6] Vish, Section 80.02.

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[6]To show the vitality of the doctrine of severability, we note that adverse possession of the surface does not extend to the minerals thereunder. *Brockman* v. *Jones,* Ky. App., 610 S.W. 2d 943 (1980); see KRS 381.430 (1972).

In spite of the theoretical purity of the doctrine of severability,[7] the two estates are inextricably intermingled. The surface covers the mineral estate, and as a result, there is inherent in the mineral estate a right of access in and through the surface to the minerals. Of what value is a mineral if it cannot be mined? The surface owner has no right in the minerals; the mineral estate is therefore considered to be the dominant estate, and the surface estate is the servient one. E.g., *McIntire* v. *Marian Coal Co.*, 190 Ky. 342, 227 S.W. 298, 299 (1921).

The conflicting rights of the surface owner and the mineral owner have led to a plethora of litigation, not only in Kentucky but throughout the United States.[8] In Kentucky, the problem has been exacerbated by the advent of strip mining and this Court's attitude toward the conflicting rights under so-called "broad form deeds".

The somewhat apocryphal term "broad form deed" is loosely defined as a conveyance which severs the mineral estate from the surface estate and which has a long and tedious description of granted rights as opposed to those mineral deeds which grant only necessary and convenient mining rights, or no mining rights at all. It is a particular, if not unique, form of deed which normally conveys all of the minerals under the surface. It may, however, list

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[7]The doctrine of severability exists in all jurisdictions except Louisiana, 4 D. Vish, Coal Law and Regulation, §80.01 [1] (1983).

[8]See generally Vish, §81.01 [3] and nn. 7-8; Zillman and Tyler, The Common Law of Access and Surface Use in Mining ,1 J. Min. L. & Pol'y 267 (1985-1986); Note, The Common Law Rights to Subjacent Support and Surface Preservation, 30 Mo. L. Rev. 234 (1973); Comment, Broad-form Deed—Obstacle to Peaceful Co-existence Between Mineral and Surface Owners, 60 Ky. L.J. 742 (1971-1972) [hereinafter cited as Comment, Broad-form Deed) 54 Am. Jur. 2d *Mines & Minerals* §§210-214; 58 C.J.S. *Mines & Minerals* §273.

only certain specific substances. Additionally, such a deed conveys — specifically to the grantee — surface rights the grantee deems necessary or convenient for the full and free exercise and enjoyment of the minerals conveyed. Some deeds, if not most, contain an express waiver of liability for damages arising from the grantee's use of the surface in obtaining the minerals. Lastly, most such deeds reserve to the grantor only such surface rights as may be consistent with the mineral rights conveyed.[9] It has been left to the Kentucky Court of last resort to interpret those deeds and to identify the rights of the surface owner as opposed to those of the mineral owner.

KENTUCKY CASES PRIOR TO *BUCHANAN* v. *WATSON*

In the early part of this century, we declared that a conveyance in a deed of "all the minerals" included any and all diamonds found thereon. *Kentucky Diamond Mining and Developing Co.* v. *Kentucky Transvaal Diamond Co.*, 141 Ky. 97, 132 S.W. 397 (1910). We said,

> "When the language of the deed is broad enough to cover everything that may be found on the land, it is not material to the effect of the deed that the parties in fact contemplated at the time that a particular thing might be found on the land. . . . *A deed is to be construed against the grantor, rather than against the grantee because the grantor selects his own words.* . . ." *Id.*, at 398, 399 (emphasis added).

Parol evidence that would limit the scope of the grant, if not excluded, was ignored and the broad conveyance of

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[9]For an excellent analysis and history of broad form deeds, see Pfeiffer, Kentucky's New Broad Form Deed Law—Is It Constitutional? 1 J. Min. L. & Pol'y. 57 (1985-1986).

"all the minerals" was given literal effect. The doctrine that a deed is to be strictly construed against the grantor, thus stated, has remained unchanged in our case law.

In the case of *Scott* v. *Laws*, 185 Ky. 440, 215 S.W. 81 (1919), we reaffirmed the principle that permitted the legal severance of the surface and the minerals thereunder. We further held that the ownership and right to mine those minerals was not lost by forty years of non-use. The rule of *Kentucky Diamond, supra,* was reiterated and extended so that if the grantor intends to omit any minerals from the conveyance he must do so explicitly in the deed.

Having clearly and unequivocally established the right to sever the surface and minerals thereunder, and having declared that a conveyance of "the minerals" conveyed *all* minerals, we turned our attention to the rights of the surface owner as opposed to the rights of the mineral owner. In *McIntire* v. *Marian Coal Co., supra,* the deed, following a severance of the minerals, granted the right "to use and operate the said land and the surface thereof" and included the right to use the surface for purposes "deemed necessary and convenient for the full and free exercise and enjoyment of any and all the property." 227 S.W. at 299. There was, however, a *reservation* to the grantor which preserved "the free use of (the surface of) said land for agricultural purposes so far as such use is consistent with the rights hereby bargained (and) sold." *Id.*

The basic question presented in *McIntire* was what right did the mineral grantee have in the surface in the face of the agricultural reservation? We resolved the conflict by allowing the mineral grantee to use as much of the surface as it deemed necessary or convenient to its mining business, including use and occupancy of the entire surface, even that occupied by the surface owner's house and garden. The Court reasoned that where a deed contains no ambiguity it will be construed strictly according to its

terms. We repeated the rule of construction that where there is ambiguity, the deed will be construed "most strongly" against the grantor in favor of the grantee. *Id.*

The Court disposed of the reservation to the surface owner by saying that "the mineral estate is dominant, superior and exclusive in every circumstance or condition when the owner thereof shall deem it necessary and convenient to make such use of the surface as the deed allows." *Id.* at 300. However, while giving the mineral owner such a broad and subjective right, the Court stated that *"such taking would have to be after satisfaction or adjudged compensation for such improvements. . . ." Id.* (emphasis added).

This Court thus declared the owner of the minerals to be the "dominant" estate and allowed the mineral owner to use the surface, *even in the face of a reservation on behalf of the surface owner.* Significantly, however, and too often ignored by many of our later cases, is the fact we provided for an award of *damages* to the injured surface owner.

In *Himler Coal* v. *Kirk,* 205 Ky. 666, 266 S.W. 355 (1924), this Court extended the principles of *Kentucky Diamond, Scott* v. *Laws,* and *McIntire, supra,* to a deed where the grantor conveyed the surface and reserved the minerals to itself. Nothing was said, however, about liability for damages to the surface owner.

In *Case* v. *Elkhorn Coal Corp.,* 210 Ky. 700, 276 S.W. 573 (1925) we again recognized the dominance of the mineral estate over the surface estate. However, for the first time, a restriction was placed by us on the mineral owner's use of the surface.

> "Clearly the defendant (mineral owner) *has the paramount right to the use of the surface in the prosecution of its business for any purpose of necessity and*

> *convenience, and of this it is to be the judge, and unless it exercised this power oppressively, arbitrarily, wantonly or maliciously, plaintiff (surface owner) cannot complain.*" *Id.* at p. 574 (emphasis added).

In addition to the damages allowed in *McIntire, supra,* this case limited the use of the surface by the mineral owner to all uses which were not oppressive, arbitrary, wanton or malicious. We relied on *McIntire,* so presumably, the surface owner could recover in damages for acts of the mineral owner that fit in any or all of the above proscribed categories.

Thus, restrictions on the previously unlimited, subjectively defined rights of mineral owners to use the surface estate appeared in our case law.

In *Wells* v. *North East Coal Company,* 255 Ky. 63, 72 S.W. 2d 745 (1934), under the terms of a grant in a broad form deed, the Court held that a mineral owner could construct a railway across the surface, *even though all the coal conveyed had been mined.* One wonders why such action was not "oppressive or arbitrary", at the very least. However, the decision of the Court reaffirmed previous rulings that the mineral estate (albeit defunct) was dominant, and extended beyond the pale of a jury the subjective judgment of the mineral owner as to what is necessary to mine minerals. The Court said,

> "(W)e are of the opinion that . . . appellee (mineral owner) is not confined in the exercise of its rights in appellant's land (surface owner) to that which may in the opinion of a jury be absolutely necessary." *Id.* at 746.

In other words, the owner of mineral rights under a broad form deed may use the surface to obtain the minerals in any way it deems necessary, and such judgment cannot be

second guessed by a jury. The only limitation is the proscription against action which is oppressive, arbitrary, wanton or malicious. *Case* v. *Elkhorn Coal Company, supra.*

The cases discussed above, all dealt with mining operations of the shaft, or deep mining, type. In *Rudd* v. *Hayden,* 265 Ky. 495, 97 S.W. 2d 35, (1930), this Court recognized the rights of the mineral owner to use the surface which "may" include "open cut", "strip" or "hydraulic" methods of mining. *Id.* at 37.

The strip mining of *coal* was first presented in the case of *Treadway* v. *Wilson,* 301 Ky. 702, 192 S.W. 2d 949 (1946). In 1907 the mineral estate was conveyed with "all easements necessary in mining and removing all said minerals. . . ." Nearly 40 years later, the Court permitted the mineral owners to remove the coal by strip mining. The rationale of the opinion was the dominance of the mineral estate, and the only limitation upon that estate was the familiar litany of oppressive, arbitrary, wanton, or malicious conduct. The case was remanded for the trial court to determine whether the proposed method, "dead-lifting," was oppressive. *Id.* at 951.

The last of the pre-*Buchanan* cases, *Gibson* v. *Sellars,* Ky., 252 S.W. 2d 911 (1952), reiterated the long standing rule of construction that, in the interpretation of deeds, parol or other extrinsic evidence is not admissible except where the language of the instrument is "ambiguous or obscure." The specific ruling declared that in a deed excepting coal and "mineral rights", the latter term included oil and gas. *Id.*

Thus, the Kentucky Court came full circle. Broad form deeds convey all minerals (unless written exceptions are specifically made); the mineral estate is dominant, as are the concomitant rights to mine and use the surface (ex-

cept for the prohibition against oppressive, arbitrary, wanton, or malicious conduct); and mining refers to and includes all forms of minerals extraction.

If there was ever any doubt under Kentucky law and under the broad form deeds about the ability of the mineral owner to use the strip mining techniques, and if there was ever any doubt about the extent to which the mineral owner could use the surface to retrieve coal and other minerals without liability to the owner of the surface, all such doubts were erased in 1956 with the rendition of *Buchanan.*

BUCHANON v. *WATSON*

The deed involved in that case was executed in 1903, and the grantee was the now famous John C.C. Mayo.[10] The deed severed the surface from the minerals, conveyed all minerals to the grantee, and provided a specific waiver of damages by the grantor for any injury to the surface caused by the grantee (or his assigns) in removing the minerals. The trial court found as a matter of fact, nearly fifty years later, that the only economical way to mine the coal was by strip mining. It also concluded that the strip mining process would destroy the surface. The surface owner argued that at the time of the executions of the deed there was no strip mining, the parties to the deed had not contemplated such mining techniques, and therefore such was not permitted under the terms of the deed, even though the deed did not address the type of mining that was to be done.

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[10]For a brief history of Mr. Mayo and his archetypical deed see Pfeiffer, *supra,* note 9 at 58-61.

The First *Buchanan* Opinion

In an unanimous opinion, originally rendered and later withdrawn, this Court held, citing *Rudd* v. *Hayden*, *supra*,

> "(S)ince the plaintiff (miner) had the right to remove all the coal in, on and under the surface of this tract, the particular method contemplated by the parties (in the absence of language prohibiting other methods) does not preclude the plaintiff from utilizing a different process made possible by the development of modern machinery, when such process offers the only means of extracting the coal."[11]

More significantly, the Court, after determining strip mining was permissible under the broad form deed, found that the mineral owner must pay damages to the surface owner for the timber and surface destroyed in the process. To arrive at this result, the Court considered the method of mining contemplated by the parties and stated:

> "It is clear from the deed the parties intended the coal would be mined in the customary manrer prevailing when it was executed. The grantor relinquished his rights in the surface and any claims for damage he might have with respect to 'the use of the land' to the extent that the land (and the timber thereon) was utilized in the process of shaft mining. The release from liability is clearly limited to damage caused by this contemplated mining method.

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[11] *Buchanan* v. *Watson*, original slip opinion, 3-4 (rendered September 30, 1955) withdrawn and modified 290 S.W. 2d 40 (second—and final—opinion rendered on May 4, 1956).

> *The use of the surface and the extensive destruction of it are two different things. The new method will result in an invasion of the defendants' surface rights not anticipated by the parties to the deed and not within the scope of the release from liability. For this reason . . . the plaintiff must pay reasonable compensation as damages to the extent he destroys, in the strip mining process, the defendants' interest in the surface and timber."*[12] (emphasis added).

The Court could have, but did not, cite the *McIntire* case, *supra,* as authority for this statement.

As stated, however, this opinion was withdrawn. The present opinion was substituted therefor and has become the focal point of much discussion, both pro and con.

The Second *Buchanan* Opinion

Using logic not too dissimilar to that in the original opinion, an also unanimous court concluded that under the particular deed strip mining was permitted. Following the finding of the trial court that strip mining was the only feasible and economical way to mine the coal and using the authority of *Rudd* v. *Hayden, supra,* we affirmed the trial court. We said,

> "In the present case, the Chancellor found from a reading of the deed that the parties thereto had not contemplated the strip and auger method of mining nor did they contemplate that any portion of the surface of the land would be destroyed or rendered valueless. . . . The deed by express language did not exclude or include this method of mining, although the proof shows that such mining methods were known

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[12] *Id.* at 4.

and had been used prior to the date of the deed. *It seems clear that the parties intended the conveyance of the coal. To deny the right to remove it by the only feasible process is to defeat the principal purpose of the deed.*" 290 S.W. 2d at 42 (emphasis added).

With respect to damages the second opinion disagreed with the original. The Court construed the deed strongly against the grantors and applied what it perceived to be the clear and unambiguous words of the deed.

> "The deed in this case conveyed virtually all rights necessary to carry out the mining of the coal, including a waiver of damages. . . . It was obvious that the estate reserved to the grantor was to be subservient to the dominant estate of the grantee. *The paramount purpose of the conveyance was to enable the grantee, or his successor in title, to remove the coal from under the surface of this land. The value of the land lay under the surface, not on it.*" *Id.* at 43 (emphasis added).

Moreover, the Court declared that the validity and enforceability of a waiver of damages provision was not to be questioned.[13] Adding a liberal dose of pragmatism to its reasoning, the second opinion stated,

> "The rule had become so firmly established that it is a rule of property law giving the rights under many mineral deeds conveying much acreage in Eastern

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[13]Even though the Court said it was enforcing the waiver of damages provision, it did, in fact, modify and limit it. The Court ruled that a waiver of damages provision does not exclude liability when the right to mine is exercised in an oppressive, arbitrary, wanton, or malicious manner. The Court thus modified a written contract, arguably making public policy.

Kentucky. To destroy this rule now would create great confusion and much hardship in a segment of an industry that can ill-afford such a blow." *Id.* at 43-44.

Thus, under our decision in *Buchanan,* the owners of mineral rights under a typical broad form deed have the virtually absolute right to mine the minerals by any means, past, present or future, and in the course of such mining to literally obliterate the surface with little or no recourse for the surface owner.[14]

POST-BUCHANAN CASES

In *Bevander Coal Co.* v. *Matney,* Ky., 320 S.W. 2d 301 (1959), a suit by a surface owner against a mineral owner for damages declared *Buchanan* to be dispositive and limited damages to any actions of the miner that were oppressive, arbitrary, wanton or malicious. In *Blue Diamond Coal Co.* v. *Neace,* Ky., 337 S.W. 2d 725 (1960), *Buchanan* was strengthened and expanded. This case involved auger mining under the terms of a broad form deed which contained a waiver of damages provision. The Court, in a suit for damages to the surface, declared that the owner of the mineral rights was entitled to a directed verdict unless its right to mine was exercised in an oppressive, arbitrary, wanton or malicious manner. We further stated:

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[14]We will not burden this opinion with an extensive description of the criticism of *Buchanan.* The interested reader may consult, for example, Randall and Pagoulatos, Surface Mining Environmental Quality: An Economic Perspective, 64 Ky. L.J. 549 (1975-1976); Schneider, Strip Mining in Kentucky, 59 Ky. L.J. 652 (1970-1971) [hereinafter cited at Schneider]; Note, Kentucky's Experience with the Broad Form Deed, 63 Ky. L.J. 107 (1974-1975); Comment, Broad-form Deed, *supra* note 9; Annot., 70 A.L.R. 3d 383 (1976).

> *"The mere exercise of a right to mine in a particular fashion cannot of itself be classified as arbitrary, wanton or malicious. It is the manner of the mining operation, as distinguished from the fact of its being carried on, that determines liability for damages."* *Id.* at 727 (emphasis added).

The attempt by the surface owner to have this Court overrule *Buchanan* was denied. The Court unanimously declared "it has always been the law that the grant or reservation of minerals carries with it the right to use the surface for the purpose of removing the minerals." *Id.*

In *Kodak Coal Company* v. *Smith,* Ky., 338 S.W. 2d 699 (1960), the *Buchanan* doctrine was unanimously extended. We upheld auger mining under a broad form deed even though the trial court found that the coal could be mined by other methods, thus making auger mining unnecessary. The then status of Kentucky law was described as follows:

> "The established law of Kentucky is that under a (broad form) mineral deed . . . the grantee as the owner of the coal, has the right to extract it by the strip or auger method of mining, and if the operation is conducted properly the *necessary use, or destruction of the surface is within the scope of the rights granted under the deed."* *Id.* at 700 (emphasis added).

Wiser Oil Co. v. *Conley,* Ky., 346 S.W. 2d 718 (1960), is arguably a change, aberration, or exception to the damage feature of the *Buchanan* doctrine. A lease, executed in 1917, gave the lessee oil and gas exploration rights. In the early 1960's the original lessee's successor began using a new technique, "water flooding", which literally flushes out oil beneath the surface estate. This process, though not unknown when the original lease was executed, was

not then in general use. As a result of this technique, there was much damage to the surface.

The surface owner sued for damages to his estate. The lessee, using *Buchanan* logic, argued not only the right to "water flood" to extract the oil, but also to be immune from damages. The Court allowed the new technique but awarded damages saying:

> "There is a sound basis for the rule that a deed or lease of minerals carries with it the right to use as much of the surface, or other property, as may be reasonably necessary to exploit the minerals. We also are aware of the well-known concept that where the injury is done to the property was of an anticipatory character, such a result would constitute damnum absque injuries. But *where, as here, there is no express release of damages and a new method of withdrawing oil is employed, which was not in the minds of the parties at the time the lease was executed and which will destroy or substantially damage the landowners remaining estate, prinicples of justice and humanity would require that reasonable compensation be paid the landowner for the destruction wrought.*" *Id.* at 721 (emphasis added).

The Court distinguished *Buchanan* by pointing out there was no waiver of damages in the questioned oil and gas lease, as there was in the *Buchanan* mineral deed. Even though it may be conceded that, *technically Buchanan* is distinguishable for the reason given, the problems resulting from using the new water flooding method are identical to those encountered in *Buchanan*. The surface owner is none the less greatly injured by a method of mining clearly unknown and not contemplated by the parties to the original deed or lease.

A seemingly slight modification of *Buchanan* and *Kodak, supra,* appeared in *Blue Diamond Coal Co.* v. *Campbell,* Ky., 371 S.W. 2d 483 (1963). A "Mayo" type broad form deed was involved in a suit for damages by the surface owner against the mineral owner. In discussing the evidence of damage, the Court said,

> "(T)here was no evidence even to suggest that these operations (strip and auger mining) were so completely unnecessary or so out of line with customary strip or mining practices as to be considered oppressive, arbitrary, wanton or malicious." *Id.* at 486.

While the Court hewed the *Buchanan* damage line, it declared that strip and auger mining could justify damages and were not *per se* proper if they were "completely unnecessary" or "so out of line".

In *Croley* v. *Round Mountain Coal Co.,* Ky., 374 S.W. 2d 852 (1964), mineral rights were retained under a reservation. Damages were allowed as the result of the mineral owner casting waste material on the surface, where the material came from *other mines.* This practice was declared to be an action of the mineral owner carrying on auger strip mining in an oppressive, arbitrary, wanton or malicious manner. *Buchanan* et al. were followed with the exception noted. Again, the Court was unanimous in its view.

In 1968, a serious and major break occurred in the unanimity of the Court with respect to the continuation of the *Buchanan* doctrine. An action for declaratory judgment alleged that the owner of minerals, under a broad form deed, had no right to remove coal by strip or auger mining. *Martin* v. *Kentucky Oak Mining Company,* Ky., 429 S.W. 2d 395 (1968). The trial court followed *Buchanan* with respect to the *right* to strip mine but allowed damages for injury to the surface. On appeal, a majority of four

judges reversed the trial court's decision with reference to damages. Citing *Buchanan* and the cases that followed it, the Court refused to reconsider its previous position. *Id.* at 396-397. After summarizing the arguments, we said:

> *"We do not mean to discredit the arguments on behalf of the landowners. They have elements of merit and a degree of persuasiveness. However, they do not have the overwhelming force to prevail against the long established rule of our previous cases upon which the property rights have vested."* *Id.* at 399 (emphasis added).

In other words, the principle of *stare decisis* controls primarily because too many people have property or investment rights which must not be upset or changed. In passing, we note that the *Martin* Court distinguished *Wiser Oil, supra,* from *Buchanan,* for the reason that there was no waiver of damages provision in the oil and gas lease in *Wiser.* The Court rather churlishly stated:

> "Perhaps *Wiser* is distinguishable from *Buchanan* on some other basis, other than that stated in the opinion in *Wiser,* or perhaps it is a departure from *Buchanan. In any event we do not feel compelled in this opinion to explain, justify, reconcile or distinguish Wiser. The court has decided to adhere to Buchanan whether or not it conflicts with Wiser."* *Id.* at 399 (emphasis added).[15]

Finally, we refer to the case of *Commerce Union Bank v. Kinkade,* Ky., 540 S.W. 2d 861 (1976). The surface owners brought an action against the mineral owners, seeking a declaration that the mineral conveyance in question did not

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[15]But see 429 S.W. 2d at 400-403 (Hill, J., dissenting) (to be discussed later in this opinion).

grant the right to mine coal by the strip or open pit method. The trial court ruled that the particular conveyance did not grant the right to strip mine or open pit mine. We affirmed. The mineral deed in question was not a broad form deed,[16] and the Court clearly so stated.

> "This court has reexamined those cases in which we have considered the 'broad form' deed and has concluded that *the deeds involved in this proceeding, and as quoted herein, do not contain language that is so extensive as to subordinate the rights of the surface estate to the demands of the mineral estate.*" *Id.* at 864 (emphasis added).

The effect of this case was to restrict the virtually unlimited rights of the mineral owners as to the surface estate to broad form deeds and to require that each challenged deed be considered on a case-by-case basis. The Court clearly affirmed its previous positions on the "Mayo" type deeds, saying:

> "We have consistently upheld what has been identified as the 'broad form' or 'Mayo deed' and in so doing have concluded that those deeds grant such overwhelming mining rights that the mineral owner in fact has the right to use the surface of the land, part or all of it, in recovering the coal acquired by the deeds." *Id.*

To the extent *Commerce Union* is inconsistent with the present opinion, *Commerce Union* is overruled.

SURFACE USE AND DAMAGES

Since *Buchanan* and its progeny still stand as authority with regard to the rights of mineral owners under broad

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[16]For an extensive description of the deed in question, see 540 S.W. 2d at 862-863.

form deeds as opposed to those of innocent surface owners, we again consider *Buchanan*.

In any analysis of *Buchanan*, there are two major points of the decision to be considered. The first deals with the right of mineral owners under a broad form deed to strip mine and to use all of the surface to obtain the minerals. The second deals with the responsibility of the mineral owner to answer to the surface owner, in damages, for the use of that surface.

Very simply stated, under the present status of Kentucky law, the owner of mineral rights under a broad form deed may use the surface - all of it - to acquire the minerals lying thereunder. The only restriction (unless one appears in the deed) is that the use of said surface may not be oppressive, arbitrary, malicious or wanton. We have reexamined the cases which led to this rule of law and frankly find no fault with them. The conveyance of mineral rights for valuable consideration is a valid exercise of the rights of the parties to make an agreement, no matter who prepared the instrument. Extrinsic evidence may not be used to vary or explain these written instruments so long as they are unambigious. The provisions in typical broad form deeds are, *beyond cavil*, clear and unambiguous. They are, in fact, *overwhelming* in their language to demonstrate an intent to convey away the rights to the minerals described. The right to the minerals carries with it the right to mine them. That a certain method of mining was known at the time the document was executed is simply not relevant. A sale implies the right to obtain and use the item sold. Without it there is, in effect, no sale. It can be argued that the parties in their wisdom recognized that fertile minds will always seek and achieve new ways of doing things, and therefore generally, if not specifically, contemplated new mining techniques which were faster, cheaper and better.

So long as the method of mining is not oppressive, arbitrary, wanton or malicious, the minerals may be removed by the owner of the mineral rights, which include the right to use the surface. We conclude this part of *Buchanan* must be affirmed.

However, with the second phase of *Buchanan* - the damages element - we disagree. As we consider the overruling of any case, or any line of cases, we are not unmindful of the desirability of continuity and its resulting predictability in the body of law. The doctrine of *stare decisis* impels us to overrule precedent only with considerable thought and care. As we stated in *D & W Auto Supply v. Department of Revenue,* Ky., 602 S.W. 2d 420 (1980):

> *"The maxim is 'Stare decisis et non quieta movere,' which simply suggests that we stand by precedents and not disturb settled points of law. Yet, this rule is not inflexible, nor is it of such a nature as to require perpetuation of error or illogic.* As we stated in *Daniel's Adm'r v. Hoofnel,* 287 Ky. 834, 155 S.W. 2d 469, 471-72 (1941) (citations omitted):
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> The force of the rule depends upon the nature of the question to be decided and the extent of the disturbance of rights and practices which a change in the interpretation of the law or the course of judicial opinions may create. Cogent considerations are whether there is clear error and urgent reasons 'for neither justice nor wisdom requires a court to go from one doubtful rule to another,' and whether or not the evils of the principle that has been followed will be more injurious than can possibly result from a change.
>
> *Certainly, when a theory supporting a rule of law* is not grounded on facts, or upon sound logic, or *is unjust,* or has been discredited by actual experience, *it should*

be discarded, and with it the rule it supports." Id. at 424 (emphasis added).

When the continuation of a legal doctrine or a precedent is detrimental to the public interest, we must reconsider it. *Payne v. City of Covington*, 276 Ky. 380, 123 S.W. 2d 1045 (1938).[17] Because we believe that the principles of justice dictate it, and that the public interest will be best served, we overrule that part of *Buchanan* which literally applies and upholds the waiver of damages provisions in broad form deeds. We also overrule any cases which hold that the mineral owner can use and damage the surface without the payment of damages, even though no waiver of damages clause is present in the deed. We hold that, subject to the applicability of this decision, whenever the owner of minerals under a broad form deed in exercising the right to remove those minerals from under the surface, causes injury to the surface, the mineral owner shall respond in damages to the owner(s) of that surface. The sole exception would be where the conveyance expressly sets out the methods of mining that may be employed and a waiver of damages from the use of such methods. It is common knowledge, and this Court takes judicial notice of the fact, that in many cases the owner of the minerals in exercising the right to

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[17]See also *Hilen* v. *Hays*, Ky., 673 S.W. 2d 713 (1984). As Justice Cardozo said in his book, *The Nature of the Judicial Process:*

> "But I am ready to concede that the rule of adherence to precedent, though it ought not be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment."

B. Cardozo, The Nature of the Judicial Process 142, 150 (1922); *noted in* Comment, Broad-Form Deed, *supra* note 9 at 752 n. 51.

mine can and does cause tremendous injury to the surface, even to the extent of obliterating the entire area, including trees, gardens, crops, homes, barns and all improvements. This fact, and the legal doctrine underpinning it, leads to the total destruction of the rights of the surface owner. In effect, the surface owner has nothing to enjoy for the "ownership" of the surface. This interest in the land is not only the subservient estate; it is no estate.

Surely it is not fair, surely it is not just, to allow such a situation to exist.

A ray of light was directed to the matter of damages in the *McIntire* case, *supra*. The Court allowed the mineral owner to use and occupy the whole surface, but said: "(S)uch taking would have to be after satisfaction or adjudged compensation for such improvements (as the plaintiff's house and garden) . . . ." 227 S.W. at 300. That ray of light was soon dimmed (although not *specifically* extinguishing) by the cases that ensued, culminating in *Buchanan*. Another ray of light, extinguished before it appeared in the law books, was the first version of *Buchanan*.[18] In what appears to be a just, fair and equitable result, that aborted decision mandated damages to the injured surface owner.

Not too long after *Buchanan*, we decided *Wiser Oil* v. *Conley*, *supra*. Although technically distinguishable from *Buchanan*, the legal principles enumerated therein showed that the Court had some doubt about permitting the unfettered destruction of the surface without compensation to the owner thereof. We declared that where a new method of withdrawing oil caused damage to the surface, principles of "justice and humanity" required reasonable compensation be paid to the surface owners. 346 S.W. 2d at 721. Why would not those same principles of "justice

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[18]See note 11, *supra*.

and humanity" apply to *coal mining*, and, a fortiori, to the broad form deed provisions which eliminate any rights of the surface owner and, in effect, *eliminate* his estate?

Judge Hill expressed these principles in his now famous dissent in *Martin* v. *Kentucky Oak Mining Company*, 429 S.W. 2d at 400-403. Citing *Wiser*, and referring to an attempt to comport it with *Buchanan*, he stated, "*Wiser* and *Buchanan* are as inconsistent as sin and salvation." *Id.* at 402. Referring to what he obviously perceived to be a lack of justice, fair play, and proper public policy, he continued:

> "I am shocked and appalled that the court of last resort in this beautiful state of Kentucky would ignore the logic and reasoning of this great majority of other states and lend its approval of encouragement to the diabolical devastation and destruction of a large part of the surface of this fair state without compensation of the owner thereof." *Id.*

These words point out what we believe to be an accurate analysis of a court-adopted and court-nurtured public policy which permits such a grossly unfair and illogical situation to exist.

It is clear that Kentucky is standing naked and alone in the view under *Buchanan*.[19] While this Court does not posit its decisions on a "numbers" game, certainly we should not be oblivious to the overwhelming authority and public policy of our sister states. Only Kentucky has reduced the property rights of the surface owner to a mere license to occupy the surface of the land until such time as

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[19] *Barker* v. *Mintz*, 215 P. 534 (Colo. 1923); *Franklin* v. *Callicoat*, 119 N.E. 2d 688 (Ohio 1954); *Stewart* v. *Chernicky*, 266 A. 2d 259 (Pa. 1970); *Doochin* v. *Rackley*, 610 S.W. 2d 715 (Tenn. 1981); *Phipps* v. *Leftwich*, 222 S.E. 2d 535 (Va. 1976); *West Virginia-Pittsburgh Coal Co.* v. *Strong*, 42 S.E. 2d 46 (W. Va. 1947). See also the additional authorities cited in note 8, *supra*.

the mineral owner elects to destroy the surface in order to remove the coal and other minerals without the payment of damages to the surface owner. It is time to change. It is time to bring our public policy into a state of consistency with fairness, justice, and social welfare.

It is highly unlikely that any parties to a deed or lease would enter into an agreement which creates two separate estates in land knowing or contemplating that one of those estates —the surface—could and would be totally destroyed, and leaving that estate owner without anything, without damages to the injured party being allowed. The obliteration of the surface would never have been anticipated by the grantor of the mineral estate. By any standards, it is grossly unconscionable to allow such harm without the awarding of damages. To allow this by judicial fiat or by judicial approval of such a contractual provision is not logical, nor is it fair, just, or in the public interest.

We can no longer countenance the existence of such a judicially created public policy, and therefore, as stated, we overrule that part of *Buchanan* v. *Watson* which denies damages to the owner of the surface of land.

Because of the possible adverse effect of our decision on mineral rights acquired in reliance on *Buchanan,* we limit the application of this decision by excluding from its effect all conveyances by broad form deed, and leases and mining efforts under broad form deeds, made between the effective date of *Buchanan,* May 4, 1956, and the finality date of this decision. Such conveyances, leases and mining efforts shall continue to be controlled by *Buchanan.* If a conveyance or lease was made while *Buchanan* was in effect, any future conveyance, lease or mining efforts pertaining to the same property shall continue to be controlled by *Buchanan.*

In those situations where the decision enunciated herein is applicable, whenever the mineral rights under a broad

form deed include the right to use the entire surface to extract the minerals, the mineral owner may do so, but must respond to the surface owner for all damages to that estate. The measure of damages shall be the difference in the market value of the surface estate, including all improvements thereon, immediately before and immediately after the use of the surface by the mineral owner. "Use of the surface" shall include any and all reclamation of the surface by the mineral owner. *Revenue Cabinet, Commonwealth* v. *Amax Coal Co.*, Ky., 718 S.W. 2d 947 (1986).

THE CONSTITUTIONAL CHALLENGE TO KRS 381.930 THROUGH 381.945 (1984)

By enacting KRS 381.930 et seq. the General Assembly belatedly responded to our decision in *Buchanan*. If these statutes are constitutional much strip mining, particularly that done under the scope of broad form deeds, will disappear.

As we previously noted, in the *Akers* case the Federal District Court certified the constitutional question to this Court. On the other hand, in *Baker* v. *Wooten* the trial court addressed the question of constitutionality and declared the statutes to be constitutional.

Basically, the opponents of the legislation attack it on four grounds: (1) that it impairs the obligation of contracts and is not a valid exercise of the state's public policy; (2) that it deprives the affected owners of mineral rights of their property without due process of law; (3) that it effects a taking of the property of the mineral owners without just compensation; and (4) that it constitutes an illegal legislative incursion into the judicial authority.

The questioned statutes are as follows:

> "381.930. Purposes of KRS 381.935 to 381.945. — The purposes of KRS 381.935 to 381.945 are as follows:

(1) To facilitate and require the demonstration of a clear understanding between the owners of surface and mineral estates in land concerning their respective rights to use and occupy or injure the surface of the land;

(2) To protect the security of titles to land and improvements thereto;

(3) To promote the free alienability of land;

(4) To prevent hardship and injustice to surface or mineral owners arising from uncertainty of the law;

(5) To promote the conservation and the full and efficient use of all natural resources of the state, including the land, the making of improvements to the land, the growth of agriculture, the development of new industry and the general economic well-being of the state and its people;

(6) To codify a rule of construction for mineral deeds relating to coal extraction so as to implement the intention of the parties at the time the instrument was created; and

(7) To foster certainty and uniformity in the operation of law. (Enact. Acts 1984, ch. 28, § 1, effective July 13, 1984.)

381.935. Definitions. — For the purpose of KRS 381.940, "method" and "methods" mean underground, surface, auger, or open pit mining and nothing in KRS 381.940 shall be interpreted to adversely affect the use of modern equipment or machinery with respect to mining methods permitted under KRS 381.940. (Enact. Acts 1984, ch. 28, § 3, effective July 13, 1984).

381.940. Rules of construction for mineral deeds relating to coal extraction. — *In any instrument heretofore or hereafter executed purporting to sever the sur-*

face and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, *it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed,* and that the mineral estate be dominant to the surface estate only for the purposes of coal extraction by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed." (Enact. Acts 1984, ch. 28, § 2, effective July 13, 1984.) (emphasis added).

381.945. Written agreement in deed directing how surface to be reclaimed. — In any deed in which the minerals are severed from the surface, the present owners of the surface rights may enter into a written agreement directing how the surface shall be reclaimed, and how the property shall be left after the extraction of the minerals, and in compliance with federal and state rules and regulations. (Enact. Acts 1984, ch. 28, § 4, effective July 13, 1984.)

The legislation, as a whole, applies to all written instruments, past, present and future, wherein the surface of land and the mineral estate are severed. It includes a rule of construction. KRS 381.940. The essence of this particular statute is that if the instrument in question does not *specifically* describe the method of "coal extraction"

to be used by the mineral grantee, it "shall be held" that the parties to the instrument "intend(ed)" that the coal shall be mined by whatever "commercial" methods were commonly known to be in use in Kentucky in the area affected at the time the instrument was executed. *Id.*

Presumably, the precise mandate of the statute, viz., "it shall be held," is directed to any court interpreting the questioned document. Specifically, if the document is silent as to the method of coal mining[20] the type of mining shall be as dictated by the statute unless there is "clear and convincing evidence to the contrary." *Id.* The effect of this language is to permit parol or other evidence to vary or explain the terms of what is otherwise an unambiguous document.

With respect to broad form deeds, it is obvious that the effect of this statute is to prevent all strip mining. The evidence in this case and the evidence generally[21] is that

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[20]It should be noted that although the statute applies to *any* estate wherein the surface and minerals are separated, the same statute limits its application to *coal mining*. Presumably, all other minerals conveyed could be mined by any method, in line with the reasoning of *Buchanan*, et al.

[21]See *Roberts* v. *Twin Fork Coal Co.*, 223 F. Supp. 752, 752-753 (E.D. Ky. 1963) (in the 1890's "virtually all mining was accomplished by the shaft method. . . . *After World War II* it became profitable to extract the coal by stripping and augering.") (Emphasis added.); Schneider, *supra* note 15, at 652:

> "Proponents of strip mining will argue . . . that strip mining was a common practice in the early 1900's. While the existence of such early strip mining practices cannot be denied, it was for the most part confined to shallow seams, outcrops near the surface, and the flat areas of Western Kentucky. The real controversy developed following World War II, when science and technology introduced larger and more efficient ma-

(Footnote Continued on Next Page)

strip mining, as it is practiced today, was non-existent in the early 1900's, when most, if not all, of the broad form deeds were executed. This Court takes judicial notice of that fact. The statute refers to the intentions of the parties to the instrument and purports to create a rebuttable presumption.[22] The fact is no such "clear and convicing evidence" is available, because there was no commercial strip mining in those years. In examining the statute, we again take notice of this fact. The statute thus converts a rebuttable evidentiary presumption into an irrebutable one which becomes a substantive rule of law.

We believe this is constitutionally impermissible. The power to make rules and to determine substantive issues of law is solely within the power of the judiciary. Sections 27, 28, and 109 of the Kentucky Constitution are as follows:

> "*§27 Legislative, excutive and judicial departments*
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> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

(Footnote Continued From Preceding Page)

chinery for biting into the mountain slopes of Eastern Kentucky."

See also Note, Reclamation of Strip Mine Spoils, 50 Ky. L.J. 524 (1961-1962), *cited in Martin* v. *Kentucky Oak Mining Co.*, 429 S.W. 2d at 401 (Hill, J., dissenting).

[22]KRS 381.940 ("in the absence of clear and convincing evidence to the contrary").

§28 Power of one department not to be exercised by the other

No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

§109 The judicial power; unified system; impeachment

The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the circuit court and a trial court of limited jurisdiction known as the district court. The court shall constitute a unified judicial system for operation and administration. The impeachment powers of the general assembly shall remain inviolate."

The separation of powers between the three equal branches of government is one of the most important facets of our Kentucky Constitution.[23] Stating this constitutional principle is simple; applying it is not always so easy. However, it is crystal clear that courts are the proper forums to determine the issues presented in the interpretation of *past* transactions, as in this case. *"It is the distinctive nature of judicial power to determine rights and obligations with reference to transactions that are past. . . ." Rohde* v. *City of Newport,* 246 Ky. 476, 55 S.W. 2d 368, 370 (1932) (emphasis added). *See also Elliott* v. *Nicholas,* 67 Ky. (4 Bush) 502, (1868).

The General Assembly has, by enacting this statute, reached across the years and has arbitrarily determined the

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[23]For a discussion of this doctrine, see *Legislative Research Commission* v. *Brown,* Ky., 664 S.W. 2d 907, 911-914 (1984).

rights of the parties and their successors to deeds and other documents. By declaring this act improper as being a clear incursion into judicial power, we do not denigrate or even comment on the nature of the reason the General Assembly so acted. It may well have been a legitimate public purpose that motivated the passage of this legislation. Nevertheless, the policy behind this bill is simply not relevant to our decision. Our sworn duty is to enforce the Kentucky Constitution. When an act of the General Assembly violates the principle of the separation of powers, we are obligated to vitiate such legislative action. We do so now.

A statute that functions retroactively to determine the meaning of a preexisting deed or lease is constitutionally impermissible because this impairs the obligation of a contract. In *Department for Natural Resources* v. *No. 8, Ltd.*, Ky., 528 S.W. 2d 684 (1975), we held another legislative approach, similar in tactics, as an unconstitutional attempt "to change the relative legal rights and economic bargaining positions of many private parties under their contracts." at 686-87. The General Assembly can specify prospectively what rights are granted or denied by use of certain language in contracts written in the future, but they cannot affect vested property rights.

In reaching this decision, we only declare that part of the legislation unconstitutional which — by virtue of the presumption created — affects past transactions, specifically, KRS 381.940. Moreover, we find it unnecessary to discuss the other grounds of alleged constitutionality that have been raised and we leave them to another day.

In the case of *Akers* v. *Baldwin*, the law is so certified. In the case of *Baker* v. *Wooten*, the decision of the trial court is reversed and the case is remanded to that court for proceedings consistent with this opinion.

Entire court sitting. Stephens, C.J., and Gant, and Leibson, JJ. concur. Vance, J., concurs by separate opinion, in which Gant, J., joins. Stephenson, J., filed a separate opinion concurring in part and dissenting in part, in which Wintersheimer, J., joins. Lambert, J., files a separate opinion concurring in part and dissenting in part, in which Wintersheimer, J., joins.

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RENDERED JULY 2, 1987
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

85-SC-392-CL

EVERETT AKERS ET AL. - - - - - - *Plaintiffs*

v.

CHARLOTTE BALDWIN ET AL. - - - *Defendants*

U. S. District Court
Eastern District of Kentucky
No. 84-88

AND

FALCON COAL COMPANY
ET AL. - - - - - *Intervening Complainants*

AND

No. 85-SC-422-TG

MATTHEW BAKER ET AL. - - - - - *Appellants*

v.

ELIZABETH WOOTEN ET AL. - - - - *Appellees*

Appeal from Perry Circuit Court
Honorable Calvin N. Manis, Judge
83-CI-429

OPINION BY JUSTICE STEPHENSON CONCURRING IN PART AND DISSENTING IN PART

It is gratifying that, at long last, this court has taken the trouble to read *Buchanan* and recognize that the holding there is that ownership of the coal gives the right to strip mine. This recognizes the myth of the "broad form deed" as not being the genesis of the right to strip mine. Unfortunately, the "broad form deed" cases do not reflect this. The "broad form deed" cases are all result oriented, wander back and forth on reasons for the result, and all have the mistaken premise that the "broad form deeds" gave this power to strip. This myth extends up to and including *Commerce Union* "language that is so extensive as to subordinate the rights of the surface estate to the demands of the mineral estate." After *Commerce Union,* in 1976, we had one rule of mineral law for Eastern Kentucky, i.e., *Buchanan,* "ownership of the coal gives the right to strip"; and one for Western Kentucky, i.e., "ownership of the coal does not give the right to strip." It is noted in the majority opinion that the mineral deed there was not a broad form deed. I wonder if any member of the court prior to *Commerce Union* even bothered to read *Buchanan.* The majority observes that *Commerce Union* restricted virtually unlimited rights of mineral owners to broad form deeds. *Buchanan* and *Commerce Union* are in absolute conflict. I do not understand the language that *Commerce Union* is overruled to the extent it is inconsistent with the majority. It should be overruled unequivocally, lest there be a lingering suspicion that there is still one rule of law for Eastern Kentucky and another for Western Kentucky. It should be made clear that ownership of the coal gives the right to strip mine even in Western Kentucky.

My concern that there may yet be two rules of law in Kentucky stems from language in the majority that:

> . . . under . . . *Buchanan,* the owners of mineral rights under a typical broad form deed have the absolute . . . right to mine the minerals by any means. . . .
>
> * * *
>
> . . . the owner of mineral rights under a broad form deed may use the surface — all of it — to acquire the minerals lying thereunder.
>
> * * *
>
> The provisions in typical broad form deeds are, *beyond cavil,* clear and unambiguous. They are, in fact, *overwhelming* in their language to demonstrate an intent to convey away the rights to the minerals described. . . .

(I had always supposed that any deed conveying the mineral did so without the necessity for overwhelming language, whatever that is.)

I think the majority unfortunately affirms the holding in *Buchanan,* giving the right to strip incident to the ownership of the minerals. With the above-quoted language and with similar language sprinkled throughout, I have nagging doubts.

I have always regarded *Buchanan* as an aberration in the law of minerals. There is absolutely no prior authority for the holding. The statement in *Buchanan,* quoted in the majority as a dose of pragmatism:

> The rule has become so firmly established that it is a rule of property law giving the rights under many mineral deeds conveying much acreage in Eastern Kentucky. To destroy this rule now would create great confusion and much hardship in a segment of an industry that can ill-afford such a blow.

is pure sophistry. There was no such rule of law until *Buchanan* manufactured it.

I am at a loss to understand why the majority would cite *Rudd* v. *Hayden* for the proposition that this court has recognized the rights of the mineral owner to use the surface which "may" include "open-cut, strip, or hydraulic" methods of mining.

Rudd involved a controversy over whether the terms of a mineral deed gave the right to quarry limestone. This court construed "mineral cement," which was included among coal, clay, oil, and gas, etc., as including limestone. One of the contentions of the surface owner was that limestone was quarried, not mined, and only such minerals as are mined were conveyed. The court dismissed the argument, stating that oil and gas are not "mined" and, for some reason, went on to say: ". . . the term mine is not limited to those cases where a shaft is sunk into the ground but may include 'open cut,' 'strip,' or 'hydraulic' methods of mining." This opinion did not recognize any of the rights stated in the majority opinion. This is a dictionary-type definition which recognizes only a definition of a word. For some unknown reason, *Rudd* was cited in *Buchanan*.

The majority opinion displays a fundamental misunderstanding of many of the cases cited in the opinion. *McIntire,* which did not involve a Mayo or broad form deed, construed the necessary and convenient mining rights contained in the mineral deed. The court held that the coal company had the right to erect and maintain houses, tipples, stores, road or other structures. It was further held that the *qualified* right reserved to the surface owner to use the land for agricultural purposes *so far as such use is consistent with the rights hereby conveyed* meant that it was plain that such use was warranted only to the extent that it did not interfere with the right of the com-

pany to build houses, shops, buildings, etc. This holding is in accordance with the express language of the deed.

Then, by dicta, the opinion says that by showing the necessity or conveyance, the company could occupy all of the surface, taking the house and garden after compensation for the *improvements.* This dicta noted that damages would be assessed for improvements. No one ever thought that the surface owner was entitled to damages for use of the surface in a state of nature.

In *Himler,* there was liability to the surface owner. There, the mineral deed had *no* reservation of mining rights, and the court held that *necessary* mining rights were implied and that the company had a right to build a railroad to transport coal across the surface. The court further held from the evidence that the railroad was a way of convenience and not necessity and that the surface owner had the right to sue for damages if the company has taken any of the surface for which there was not a strict necessity. The principles in McIntire, are not involved.

In *Case,* the mineral deed appears the same as *McIntire,* not a Mayo or broad form deed. The court held that in the exercise of *necsssary* and *convenient* mining rights the company had a right to locate and construct a transmission line over the surface and that the fact that the line had not been constructed in ten years was not an arbitrary exercise of power by the company. No damages were allowed in this opinion. The opinion did limit the exercise of necessary and convenient mining rights to the extent that the exercise of the powers were not oppressive, arbitrary, wanton, or malicious. In the 1920's, the court was construing the term "necessary and convenient" mining rights, and *Case* represents a limitation if convenient rights are exercised oppressively, etc.

In *Wells,* the court held that where necessary and convenient mining rights are conveyed in a mineral deed

(here, Mayo deed), the coal company is not confined in the exercise of its rights to the surface to that which, in the opinion of a jury, would be absolutely necessary. The company is only responsible for damages if, in the exercise of the rights, it acted arbitrarily, wantonly, or maliciously. Another issue was that a tram road had been constructed over the surface after the coal had been mined and exhausted. This tram road hauled coal from other lands across the surface. The court pointed out that the mineral deed expressly gave this right to the coal company.

The court mentioned only the necessary and convenient mining rights in the mineral deed and did not base any of the rulings on the broad form deed. Oppressive or arbitrary exercise of rights was not involved at all.

Treadway held that the owner had the right to strip mine for the reason that the mineral owner has the paramount right to use the surface, citing *Case* and others. *Buchanan* did not cite *Treadway* as authority for the right to strip mine. This opinion reversed the trial court for not permitting an answer to be filed, alleging that stripping would be an "oppressive" exercise of the mineral owner granted privileges. The trial court was directed to hear evidence upon the issue and determine the rights of the parties. We hear no more of *Treadway,* and I have never seen or heard a proponent of the "broad form deed" suggest this solution to determine the rights of the parties.

I approve of the majority overruling the damages portion of *Buchanan.* I never thought that rules of law pronounced in logical and reasonable cases involving underground mining should have been used as authority for the denial of damages for strip mining the surfaces.

The broad form deeds really evolve down to granting necessary and convenient mining rights for underground mining.

I am gratified that the majority opinion acknowledges that obliteration of the surface would never have been anticipated by the grantor of the mineral estate. Justice Vance, in his concurring opinion, states that the terms contained in the "broad form" deeds indicate that the parties contemplated deep-mining only.

All of the mining rights granted in a "broad form" deed are consistent with underground mining, particularly use of timber below a certain circumference for mining purposes (roof support props for underground mining) and where the right to subjacent support is waived and is permitted, as in one of the mineral deeds here (Akers case) where the mineral owner is permitted to pull pillars and cause subsidence of the surface.

I was under the impression that a basic rule of construction of deeds was to gather the intention of the parties from the language of the instrument.

If it is clear from the deed that the parties contemplated underground mining, how can it be said that the deed gives the right to strip mine, which is inferred in *Buchanan* from ownership of the coal?

In all of these cases, timber is expressly reserved except for timber up to a certain size which may be used for mining purposes. *Buchanan* never refers to this express reservation and only one of the broad form deed cases, *Kodak Coal Company* v. *Smith,* Ky., 338 S.W. 2d 699 (1960), mentions the destruction of timber where the issue is brushed off as incident to the right of utilizing the surface.

On the same theme is the ancient right to subjacent support. A historical analysis of the development of this right is contained in Kentucky Law Journal, Vol. 73, beginning on page 439. It is pointed out that the problem of surface subsidence due to underground mining opera-

tions arose early in England and quickly developed by case law to an absolute right of support. This rule of law is recognized in *Blue Diamond Coal Company* v. *Neace,* Ky., 337 S.W. 2d 725 (1960), which cited *H. B. Jones Coal Co.* v. *Mayes,* 225 Ky. 365, 8 S.W. 2d 626 (1928), and *West Kentucky Coal Co.,* v. *Dilback,* 219 Ky. 783, 294 S.W. 478 (1927). However, *Neace* only referred to this proposition as an issue and made no further reference to it. *West Kentucky* succinctly states the rule in this Commonwealth:

> As we have said, the right to mine is subservient to the right of the surface owners to have the surface maintained in its natural state free from subsidence or partings of the soil, and this right of support is absolute and not dependent upon any question of negligence. But this doctrine ought not to be extended any further than applying it to the surface above the mining operation.

H. B. Jones, citing *West Kentucky,* states the same rule as does *North-East Coal Co.* v. *Hayes,* 244 Ky. 639, 51 S.W. 2d 960 (1932), and *Elk Horn Coal Corp.* v. *Johnson,* Ky., 249 S.W. 2d 745 (1952). These last two cases involved "broad form" deeds, as did *H. B. Jones.* These cases are good law today and have never been considered by the "broad form" deed cases. It is a paradox under the same mineral deed to hold that the surface owner on one hand had an absolute right to subjacent support in an underground mining case and, on the other hand, validate the destruction of the surface by strip mining.

Buchanan never treats these issues, nor does the majority opinion. I can only assume these two rights are ignored for the reason they cannot be explained away.

I would overrule *Buchanan* in its entirety together with its progeny.

The majority does not specify when the owner of the surface should be paid. I hope it means before strip mining commences.

Another thought occurs to me, and that is this court has spoken at great length about John C. C. Mayo deeds as broad form deeds. Although it is not briefed or argued, I wonder why everyone is assuming the deeds involved here are broad form deeds. They are not Mayo deeds. This seems to be an issue that has not been litigated. Perhaps in the plethora of lawsuits which may be generated by the majority opinion an insight will be given into this question.

The deed from E. C. Halliday, etc., to Robert C. Ream, Trustee, in the Baker case, contains the following language just before the description of the first tract by courses and distances: "But agrees to pay damages to improvements and growing crops."

I would assume this language means what it says that the surface owner can recover for damage to improvements which is the rule expressed in *McIntire*. Improvements should mean all buildings, structures, crops, fencing, orchards, and pastures, i.e., all the land not in a state of nature. Obviously, the trial court can have these damages assessed.

Turning now to the constitutional challenge to the statute, I first point out that the theory that the statute impairs the obligation of a contract is simply not tenable. I have been unable to find a case that holds that a judicial decision interpreting a contract vests such an interest in the contract so as to nullify a statute on the ground of impairment of the obligation of a contract. If a judicial decision accomplished this, then the same court would be similarly bound and powerless to adopt a different conconstruction later. None of the cases cited by the coal companies hold that, and, in particular, *No. 8 Ltd.* does not

apply here. The statute involved there purported to be an exercise of police power on the part of the Commonwealth. The simple holding in the opinion is that the Commonwealth may not constitutionally delegate police power to private individuals so that each individual could determine if strip mining should occur on the surface owned by that individual. Thus, the reliance of the majority opinion on *No. 8 Ltd.* is misplaced.

I am intrigued by the approach of the General Assembly in the selection of language in KRS 381.930, et seq.

In particular, I refer to: "(6) To codify a rule of construction for mineral deeds relating to coal extraction so as to implement the intention of the parties at the time the instrument was created; (7) To foster certainty and uniformity in the operation of law."

The rules of construction in KRS 381.940 appear to be another way of saying that the courts should construe the mineral deed in accordance with the intention of the parties.

Reading the mineral deeds here, and the Mayo deeds, can lead but to one conclusion — that the parties contemplated deep mining, not surface mining.

This is recognized in the majority opinion. It does not seem to be all bad that the General Assembly would codify what we have always said and direct that we follow our own rule. In this respect, I am of the opinion the legislation is valid.

I do not understand the concern in the majority about permitting parol evidence to explain the terms of an unambiguous instrument. So far as Eastern Kentucky is concerned, in the area of the Mayo deeds, we take judicial notice that there was no strip mining at the time the deeds were executed. The Mayo deeds have also been construed as unambiguous. I do not know about other areas of Ken-

tucky, including other areas of Eastern Kentucky. After all, it is not settled that *all* mineral deeds contain no ambiguity.

If we take judicial notice that there was no strip mining in the area of the Mayo deeds and they contain no ambiguities, then parol evidence is not indicated.

I am of the further opinion that this court cannot by opinion vest property rights which cannot be changed by subsequent opinion if not already exercised. By the same token, the General Assembly has the constitutional power to do the same.

Wintersheimer, J., joins.

RENDERED: JULY 2, 1987
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 85-SC-392-CL

EVERETT AKERS Et Al. - - - - - *Plaintiffs*

v.

CHARLOTTE BALDWIN Et Al. - - - *Defendants*

U. S. District Court
Eastern District of Kentucky
No. 84-88

AND

FALCON COAL COMPANY
Et Al. - - - - - *Intervening Complainants*

AND

No. 85-SC-422-TG

MATTHEW BAKER Et Al. - - - - - *Appellants*

v.

ELIZABETH WOOTEN Et Al. - - - - *Appellees*

Appeal from Perry Circuit Court
Honorable Calvin N. Manis, Judge
No. 83-CI-429

CONCURRING OPINION BY JUSTICE VANCE

Vance, J., concurring. I agree that the sale of mineral rights by deed of severance from the surface carries with it the right to remove the mineral. This was the holding in *Buchanan* v. *Watson,* Ky., 290 S.W. 2d 40 (1956), and in such earlier cases as *Himler Coal Company* v. *Kirk,* Ky., 266 S.W. 355 (1924). There is an implied right, as a matter of necessity, to remove that which has been purchased, even when the document of sale does not expressly create such a right. As was succinctly stated in *Himler Coal Company, supra:*

> "The effect of the conveyance by the Tug River Coal and Salt Company to Barrett of the surface only was the same as if Barrett had been the owner of the entire estate and had conveyed to the Tug River Coal and Salt Company the coal beneath his land, and if he had done that, he could not now be heard to say: 'it is true that I conveyed this coal to the Tug River Coal and Salt Company, but I didn't grant to it any right to remove it.' In other words, he cannot say 'Yes, I sold it to them, but I am not going to let them have it.'"

Himler Coal Company, supra, dealt with an underground mine. *Buchanan, supra,* dealt with strip mining. Strip mining, of course, does far greater damage to the surface, and it follows that the sale of coal does not carry with it the right to strip mine if there is any other reasonable way to remove the coal with less damage to the surface.

Although the sale of the coal necessarily carries with it the implied right to remove the coal, it does not follow that the surface owner can be damaged with impunity without liability. In the underground mine cases, the mineral owner, as a matter of necessity, had the right to open a shaft to get to the coal and the right to necessary ease-

ments across the surface to transport the coal after it had been mined. These were only such rights as were absolutely necessary, and liability did attach for damage to the surface that was not strictly necessary. *Himler Coal Company* v. *Kirk, supra.*

The mineral owner had no right to cause subsidence and destroy the surface without liability. Thus, the sale of coal, in itself, and without any express waiver of damage, gave the mineral owner some limited use of the surface, but no right to utterly destroy it.

The "broad form" deeds of conveyance contained a long list of mining rights which gave to the mineral owner almost unlimited right to use the surface without liability. It was this long list of mining rights which impelled the court in *Buchanan, supra,* to hold that the surface owner had voluntarily waived the right to recover for the damage inflicted by strip mining.

The express reservation of mining rights contained in the "broad form" deeds, including in some instances the waiver of damage for subsidence and for use of timber below a certain size, plainly indicates to me that the parties to these deeds contemplated deep mining only. Timbers below the size enumerated were used for roof supports in underground mines, but would not be useful in strip mines. Subsidence occurred when pillars were pulled in underground mines. I believe the *Buchanan* court erred when it did not limit the waiver of damages contained in the "broad form" deeds to cases involving underground mines, and for that reason I concur with the majority which today overrules that portion of *Buchanan, supra.*

Nevertheless, the opinion in *Buchanan, supra,* has been the law in this Commonwealth from 1956 until today. Stability in the law is important, and citizens should be free to conduct their business in view of recognized principles of law. Because many contract rights and business obli-

gations have vested and have been incurred since the 1956 decision in *Buchanan* in reliance upon that opinion, the majority has deemed it proper to protect those bona fide contract rights and obligations by giving prospective effect only to this decision as it affects those situations.

The cases which have allowed strip mining without liability for damage to the surface have done so upon the theory advanced in *Buchanan, supra,* that damages had been waived, or under a misperception that *Buchanan* was premised upon the theory that the granting of overwhelming mining rights in the "broad form" deeds authorized strip mines.

No case, to my knowledge, has held that the utter destruction of the surface is permissible simply because it is a matter of necessity or a necessary mining right in strip mining. It is true that in strip mining the only method in which the coal can be mined often utterly destroys the surface. I do not believe that the line of authority which grants to the owners of coal in underground mining situations the right of necessity to use the surface in such a manner as is necessary to remove the coal (but which as a practical matter did not destroy the surface) should be extended to strip mining situations and permit, as a matter of necessity, the utter destruction of the surface.

I therefore agree with the majority that severance of the coal from the surface carries with it the right to remove the coal, including the right to strip mine if that is necessary. The destruction of the surface occasioned by strip mining, however, must be paid for and should not be permitted as a necessary mining right without liability for damage to the surface unless such damage is expressly waived, and except in those cases that remain protected by prospective application of *Buchanan* v. *Watson.*

Gant, J., joins in this concurring opinion.

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SUPREME COURT OF KENTUCKY

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Appeal from Perry Circuit Court
Honorable Calvin N. Manis, Judge
83-CI-429

OPINION BY JUSTICE LAMBERT CONCURRING IN PART, AND DISSENTING IN PART

I would uphold the constitutionality of KRS 381.930-.945 and overrule this Court's decision in *Buchanan* v. *Watson,* Ky., 290 S.W. 2d 40 (1956). I take this position because of my conviction that the parties to the so-called "broad form deed" instruments did not contemplate strip mining or the wholesale destruction of the surface at the time the instruments were executed.

The typical broad form deed contains extremely broad language in favor of the grantee. Nowhere in the instrument, however, is the mining method identified, and the timber is reserved to the surface owner as is the right to freely use the surface for agricultural purposes. As strip mining was unknown at the time of execution of the instrument and significant surface rights were reserved to the landowner, it is clear that the parties did not contemplate substantial harm to the surface of the land in the course of mineral removal.

Justice Stephenson accurately observes in his opinion that *Buchanan* v. *Watson* is "an aberration in the law of minerals. There is absolutely no prior authority for the holding." It was the advent of equipment capable of moving massive amounts of earth which created the potential for dramatic change in the benefits and burdens of the contracting parties. Ignoring the state of technology which existed at the time the instrument was executed, the *Buchanan* court erroneously conferred a right which did not exist by virtue of the deed.

While I disagree with much contained in the majority opinion, surely one portion of it is correct: "It is clear that Kentucky is standing naked and alone in the view under *Buchanan.*" The states of Ohio, Virginia, West Virginia,

Pennsylvania, Tennessee, Colorado, and Texas* have all expressed the view that since strip mining is incompatible with the enjoyment of the surface estate, the right to remove minerals does not carry with it the right to destroy the surface unless the contrary intention affirmatively appears in the instrument. In *Skivolcki* v. *East Ohio Gas Company*, 38 Ohio St. 2d 244, 313 N.E. 2d 374 (Oh. 1974), the Ohio Supreme Court adopted the Pennsylvania view as expressed in *Stewart* v. *Chernicky*, 439 Pa. 43, 266 A. 2d 259, 263 (Pa. 1970) quoting *Wilkes-Barre Twp. School District* v. *Corgan*, 403 Pa. 383, 386, 170 A. 2d 97, 98 (1961) as follows:

> Where the language of a contract is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that is is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute *while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred.*

Likewise, in *Doochin* v. *Rackley*, 610 S.W. 2d 715, 719 (Tenn. 1981), the Supreme Court of Tennessee said:

> Strip mining cannot be presumed to have been within the contemplation of the parties. Consequently, no right to strip mine accompanied ownership of the

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*_Franklin_ v. _Callicoat_, 119 N.E. 2d 638 (Ohio 1954); _Phipps_ v. _Leftwich_, 222 S.E. 2d 536 (Va. 1976); _West Virginia-Pittsburg Coal Co._ v. _Strong_, 42 S.E. 2d 46 (W.Va. 1947); _Stewart_ v. _Chernicky_, 266 A. 2d 259 (Pa. 1970); _Doochin_ v. _Rackley_, 610 S.W. 2d 715 (Tenn. 1981); _Smith_ v. _Moore_, 474 P. 2d 794 (Colo. 1970); and _DuBois_ v. _Jacobs_, 551 S.W. 2d 147 (Tex. 1977).

> mineral rights. Nor is there any evidence that the parties intended a contrary result.

While I concur with that portion of the majority opinion which allows the surface owner to recover damages, taken as a whole, the majority opinion does little to remedy the harm caused by *Buchanan.*

KRS 381.930-.945 is almost identical to the Tennessee statute addressed in *Doochin* v. *Rackley, supra*. The court in *Doochin* more than sufficiently answered the constitutional challenge to the statute, and its reasoning is persuasive. To the extent that some may argue reliance upon prior decisions of this Court, it should be noted that:

> There is no vested right in the decisions of a court, and a change of decisions of a state court does not constitute the passing of a law (in contravention of the United States Constitution, Article I, Sec. 10), although the effect of such change is to impair the validity of a contract made in reliance on prior decisions.

16A Am. Jur. 2d *Constitutional Law* §703 (1979).

The Contract Clause, Article I, Sec. 10, of the United States Constitution, and Sec. 19 of the Kentucky Constitution protect only those rights which are embraced in the contract of the parties at the time the contract is entered into. The subsequent occurrence of unforeseen advantage is not entitled to constitutional protection. As the Supreme Court said in *El Paso* v. *Simmons,* 379 U. S. 497, 515, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1964):

> These developments (the discovery of mineral wealth) hardly to be expected or foreseen, operated to confer considerable advantages on the purchaser and his successors and a costly and difficult burden on the State. *This Court's decisions have never given a law which*

> *imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.* (Citations omitted.) Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract. (Emphasis added.)

With the enactment of KRS 381.930-.945, the General Assembly did no more than codify a rule of construction designed to give effect to the intention of the parties. I do not regard this as an attack upon the Constitution of Kentucky and see no reason to declare it unconstitutional.

Wintersheimer, J., joins.

Supreme Court, U.S.
FILED
OCT 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-351

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE STEARNS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of a federal court of appeals, which applied the Kentucky state law of mineral conveyances, should be reconsidered in light of a recent decision of the Kentucky Supreme Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Akers v. *Baldwin*, No. 85-SC-392-CL (Ky. July 2, 1987) 4, 5, 6, 7

Buchanan v. *Watson*, 290 S.W.2d 40 (Ky. Ct. App. 1956) 6, 7, 8

Butner v. *United States*, 440 U.S. 48 (1979) 6

Commerce Union Bank v. *Kinkade*, 540 S.W.2d 861 (Ky. 1976), cert. denied, 430 U.S. 915 (1977) 5, 7, 8

Huddleston v. *Dwyer*, 322 U.S. 232 (1944) 6, 7

Martin v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. Ct. App. 1968) 5

Statutes:

Surface Mining Control and Proclamation Act of 1977, 30 U.S.C. (& Supp. III) 1201 *et seq.* 3

Weeks Act of 1911:

16 U.S.C. 480 6
16 U.S.C. 500 6
16 U.S.C. 515-517 6
16 U.S.C. 517a 6
16 U.S.C. 518 (§ 9) 2
16 U.S.C. 518-519 6
16 U.S.C. 520 6
16 U.S.C. 521 6
16 U.S.C. 552 6
16 U.S.C. 563 6

28 U.S.C. 1345 3

Ky. Rev. Stat. Ann. (Michie/Bobbs-Merrill (Supp. 1986)):

§ 381.930(6) 4
§§ 381.930-381.945 4
§ 381.935 4
§ 381.940 ..... 4, 5

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-11a) is reported at 816 F.2d 279. The opinion of the district court (Pet. App. 13a-24a) is reported at 595 F. Supp. 808.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1987. Rehearing was denied on June 2, 1987 (Pet. App. 1a). The petition for a writ of certiorari was filed on August 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

In 1937, petitioner sold the United States several tracts of land in Wayne and McCreary Counties, Kentucky, reserving certain mineral rights in the land. Petitioner now claims that the reservation of mineral rights entitles it to strip mine coal on one of the tracts. Pet. App. 14a. Both courts below rejected this reading of petitioner's deed,

holding that the "surface rights of the United States in the [1937] deed * * * are superior" to petitioner's mineral rights (*id.* at 12a). The question in this case is whether the holding below should be reconsidered in light of a subsequent decision of the Kentucky Supreme Court concerning the proper interpretation of so-called "broad form" deeds.

1. In 1937, petitioner sold the United States 46,842.4 acres of land for inclusion in the Daniel Boone National Forest (Pet. App. 14a). Petitioner's 1937 deed reserved coal and other specified minerals to itself as grantor, but expressly required that the mining and removal of such minerals comply with certain rules prescribed by the Secretary of Agriculture, which were written into the deed (Pet. 7-8; Pet. App. 4a-6a).[1] These rules explicitly forbade hydraulic mining, but were silent about the permissibility of strip mining of surface coal by nonhydraulic, mechanical means.[2] In 1955, the Secretary of Agriculture denied petitioner's request for permission to strip mine the tracts (Pet. App. 3a, 14a). The Forest Service subsequently denied a renewed request, explaining both that petitioner

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[1] Section 9 of the Weeks Act of 1911, 16 U.S.C. 518, directs that "reservations retained by the owner from whom the United States receives title * * * shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration, and [that] such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States * * *."

[2] Among other things, the rules and regulations of the Secretary reproduced in the deed provide (Pet. App. 5a-6a) that, "[i]n prospecting for, and in mining and removing minerals, oil, or gas * * * only so much of the surface shall be occupied, used or disturbed as in [*sic*] reasonable and, according to recognized good practice, necessary for the purpose," and that, "[i]n underground operations all reasonable and usual provisions shall be made for the support of the surface, and to that end the tunnels, shafts, and other workings shall at all reasonable times be open to inspection and examination by the forest officers and mining experts or inspectors of the United States."

lacked any legal right to strip mine under its 1937 deed reservation and that the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, forbade such mining on national forest land (Pet. App. 3a, 14a-15a).

In 1978, after obtaining a state permit to surface mine a 19-acre tract of the deeded land, petitioner commenced this action in the United States District Court for the Eastern District of Kentucky. It sought a declaration that it could strip mine the 19-acre tract by virtue of the 1937 deed reservation.[3] Petitioner's suit was consolidated with a later suit by the United States for a declaration of the respective rights of the parties under the 1937 deed. Pet. App. 4a, 15a. Since the United States was plaintiff in its separate suit, the jurisdiction of the district court to adjudicate these respective rights was predicated on 28 U.S.C. 1345 (Pet. App. 4a n.1).

Applying the common law of Kentucky, as reflected in the decisions of state appellate courts, the district court concluded that the 1937 deed did not accord petitioner the right to strip mine. The court found it apparent "from all the language in the deed[,] that the parties did not intend that [petitioner] would have superior rights to extract the minerals over the surface rights of the government." The court therefore held that "the surface rights of the United States in the deed involved are superior to the mineral rights of [petitioner], so [petitioner] cannot engage in surface mining on the property listed in the deed involved

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[3] Petitioner states that "much of the coal retained by Stearns can be removed *only* by surface mining methods" (Pet. 8 (emphasis in original)). Neither the pleadings nor the proof, however, addressed the question whether the coal was recoverable solely through surface mining methods.

without approval from the United States." Pet. App. 23a-24a.[4]

2. On petitioner's appeal, the court of appeals affirmed, holding that petitioner "as owner of the mineral estate did not retain rights superior to any conveyed to the United States as surface owner" (Pet. App. 9a). Citing Kentucky state court decisions, the court of appeals explained that in cases involving so-called "broad form" deeds, which permit "the mineral owner [to] mine virtually without limitation," "the surface estate has been held subservient to the dominant estate of the mineral holder" (*id.* at 6a).[5] The court noted, however, that the 1937

[4] Alternatively, the district court held that petitioner's claim failed under Ky. Rev. Stat Ann. §§ 381.930-381.945 (Michie/Bobbs-Merrill (Supp. 1986)), which took effect on July 13, 1984. That legislation's declared intent was to "codify a rule of construction for mineral deeds relating to coal extraction" (*id.* § 381.930(6)); the statute was to govern any preexisting or future "instrument * * * purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals" (*id.* § 381.940). For those instruments that failed to specify the method of coal extraction, the parties to the instrument would be deemed to have intended "that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate only for the purposes of coal extraction by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed." *Id.* § 381.940. The district court noted that the statute had been challenged as inconsistent with the Kentucky state constitution, and the court accordingly premised its holding both on the statute *and*, independently, on state common law (Pet. App. 20a). The statute was in fact subsequently struck down under the Kentucky State Constitution. *Akers* v. *Baldwin*, No. 85-SC-392-CL (Ky. July 2, 1987).

[5] As later described by the Kentucky Supreme Court (Pet. App. 30a-31a, reprinting *Akers* v. *Baldwin*, No. 85-SC-392-CL (July 2, 1987)), the term "broad form" generally characterizes a deed that "has a long and tedious description of granted rights as opposed to those mineral deeds which grant only necessary and convenient mining

deed at issue in this case—which places a number of express conditions on petitioner's mineral rights—is *not* a broad form deed (see *id.* at 8a-9a). Relying on *Martin* v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. Ct. App. 1968), and *Commerce Union Bank* v. *Kinkade*, 540 S.W.2d 861 (Ky. 1976), cert. denied, 430 U.S. 915 (1977), the court concluded that the proper interpretation of such narrower deeds turns on "whether the parties 'intended that the mineral owner's rights to use the surface in removal of minerals would be superior to any competing right of the surface owner' " (Pet. App. 8a (citation omitted)). And here, the court held that, "[s]ince some rights were preserved in the surface owner, it follows *a fortiori* that [petitioner] as owner of the mineral estate did not retain rights superior to any conveyed to the United States as surface owner" (*id.* at 9a).[6]

3. One month after the court of appeals denied rehearing in this case, the Kentucky Supreme Court issued an opinion in *Akers* v. *Baldwin*, No. 85-SC-392-CL (July 2, 1987) (*reprinted in* Pet. App. 25a-80a), which "consider[ed] the legal effect of the so-called 'broad form deeds' on the conflicting rights of the owners of the sur-

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rights, or no mining rights at all"; that "normally conveys all of the minerals under the surface," although it may "list only certain specific substances"; that assures the owner of the mineral estate surface rights he "deems necessary or convenient for the full and free exercise and enjoyment of the minerals conveyed"; that usually contains "an express waiver of liability for damages arising from the * * * use of the surface to obtain the minerals"; and that leaves to the owner of the surface estate "only such surface rights as may be consistent with the mineral rights conveyed."

[6] Alternatively, the court of appeals affirmed the district court's ruling that petitioner's claim would fail under Ky. Rev. Stat. Ann. § 381.940 (Michie/Bobbs-Merrill (Supp. 1986)) (Pet. App. 11a) (see note 4, *supra*). But recognizing that the statute might be held unconstitutional, the court of appeals "adhere[d] to [its] holding affirming the district court based upon the common law of Kentucky" (Pet. App. 10a).

face to land and the owners of the mineral rights under that land" (Pet. App. 26a). In *Akers*, the Kentucky court reaffirmed its prior decision in *Buchanan* v. *Watson*, 290 S.W.2d 40 (Ky. Ct. App. 1956), holding that "the owner of mineral rights under a broad form deed may use the surface—all of it—to acquire the minerals lying thereunder. The only restriction (unless one appears in the deed) is that the use of said surface may not be oppressive, arbitrary, malicious or wanton" (Pet. App. 46a). The court accordingly held that a person holding mineral rights under a broad form deed may strip mine the surface, although he may have to pay damages to the owner (see *id.* at 48a).

ARGUMENT

This Court generally does not review, "save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). Instead, this Court typically defers to the "federal judges who deal regularly with questions of state law in their respective districts and circuits[,who] are in a better position * * * to determine how local courts would dispose of comparable issues." *Butner* v. *United States*, 440 U.S. 48, 58 (1979). Here, petitioner seeks a departure from this principle because, it claims, the decision below is inconsistent with the Kentucky Supreme Court's subsequent decision in *Akers*.[7]

We agree, of course, that an intervening state court decision may present grounds for reconsideration of a

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[7] Petitioner also suggests (Pet. 22-23) that the decision below is somehow inconsistent with unspecified portions of the Weeks Act of 1911, 16 U.S.C. 480, 500, 515-517, 517a, 518-519, 520, 521, 552, 563. Petitioner fails to explain how this is so, however, and its Weeks Act argument is not, in any event, submitted as part of the questions presented in the petition (see Pet. i).

federal ruling that turns on an application of state law. See, *e.g., Huddleston,* 322 U.S. at 237-238 (vacating the judgment of a federal court of appeals and remanding with instructions to reconsider the case in light of an intervening state court decision). Here, however, petitioner's argument turns on a plain misreading of *Akers.* By its terms, *Akers* states a rule of construction that governs only broad form deeds. In stating the issue on appeal, the *Akers* court explained that it was "consider[ing] the legal effect of the so-called '*broad form deeds*' " (Pet. App. 26a (emphasis added)); in stating its holding, the court addressed the status of "the owner of mineral rights under a *broad form deed*" (*id.* at 46a (emphasis added)). And throughout its opinion, the court made it clear that it was addressing doctrine only as it related to broad form deeds (see, *e.g., id.* at 26a, 30a, 35a, 36a, 37a, 40a, 45a, 48a, 51a-52a).

Here, in contrast, the parties agreed below that the 1937 deed is *not* of the broad form type (see Pet. App. 21a). That fact was crucial to the court of appeals' decision (see *id.* at 7a-9a). Indeed, the court below made clear that, under *Buchanan* v. *Watson, supra* (the Kentucky Supreme Court decision that was reaffirmed by *Akers*), petitioner would have prevailed had this case involved a broad form deed (see Pet. App. 6a). *Akers* therefore is wholly inapposite here.

Petitioner nevertheless contends (Pet. 17-18) that *Akers* eliminated the distinction between broad form and more narrowly worded deeds by overruling *Commerce Union Bank* v. *Kinkade, supra,* a decision upon which the court below in part relied. Again, this argument turns on a plain misreading of *Akers. Akers* described, with apparent approval, *Commerce Union Bank's* holding that non-broad form deeds do *not* reserve the mineral owner's right to strip mine. At the same time, the *Akers* court noted that *Commerce Union Bank* appeared to reaffirm the rule that broad form deeds preserve the right to strip mine. *Akers*

then concluded its discussion by stating that, "[t]o the extent *Commerce Union* is inconsistent with the present opinion, *Commerce Union* is overruled." Pet. App. 45a. In making this statement—which occurred at the conclusion of a lengthy analysis of cases dealing with broad form deeds (see *id.* at 31a-44a) and immediately prior to the court's decision to reaffirm *Buchanan's* holding "with regard to the rights of mineral owners under broad form deeds" (*id.* at 45a-46a)—the *Akers* court plainly meant only to confine *Commerce Union Bank* to cases that do not involve broad form deeds.[8] Because this case does not involve such a deed, *Commerce Union Bank* is, as the court below recognized, controlling. There accordingly is no need to require further consideration of the issue by the court of appeals in a case that has now been pending for almost ten years.

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[8] Petitioner points to the separate opinion of Justice Stephenson, who concurred and dissented, in contending that *Akers* overruled *Commerce Union Bank* (Pet. 18 n.9, citing Pet. App. 62a (opinion of Stephenson, J.)). In fact, however, Justice Stephenson took the majority to task for *not* unequivocally overruling *Commerce Union Bank* (see Pet. App. 62a).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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